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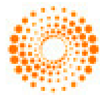

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ASIA TAX AND TRADE BULLETIN

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ISSUE 11, 18 March 2016
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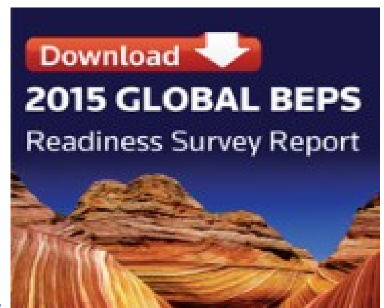

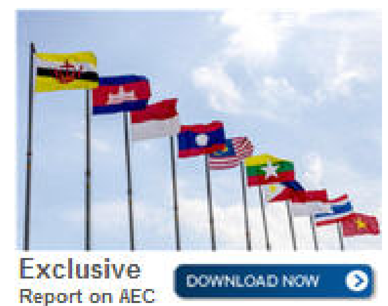

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PRACTITIONER ARTICLES

[1]. KOREA: WITHHOLDING OBLIGATION ON FOREIGN SECONDEES CLARIFIED - BY *KYUNG-SU HAN (SEOUL), PARTNER, DELOITTE KOREA*

Among proposed revisions to the tax law announced in August 2015 by the Korean Ministry of Strategy and Finance were changes to impose withholding tax on foreign employees seconded to work in Korea.

The Korean tax authorities have now issued guidance on 17 February 2016 that clarifies the upcoming requirement for domestic companies to withhold income tax from the salaries of certain foreign employees seconded to a Korean company.

Currently, a foreign secondee to Korea whose employment costs are not borne by a Korean entity is not subject to income tax withholding. Instead, the individual must either file an annual income tax return to report the income and pay the corresponding income tax, or join a taxpayers' association and have the tax withheld on a monthly basis.

According to a new tax law that will apply as from 1 July 2016 (postponed from the originally scheduled effective date of 1 January 2016), where the employment costs of a foreign secondee to a Korean company are not borne directly by the Korean entity, the Korean entity may be required to withhold income tax at a 17% rate (18.7%, including the local income tax surcharge) on a monthly basis when the Korean entity pays the service fee to the foreign company. The amount subject to income tax withholding will be the amount of the service fee that is attributable to the earned income of the foreign secondee.

The February guidance clarifies that a Korean company that satisfies all of the following conditions will be subject to the new withholding income tax obligation:

- The Korean company paid more than KRW 3 billion per year in service fees to the foreign company dispatching the employees to Korea;
- The Korean company's prior year revenue is KRW 150 billion or more, or its prior year total assets are KRW 500 billion or more; and

- The core business of the Korean company is air transport, construction or the provision of professional, scientific or engineering services.

A foreign company seconding employees to Korea will be able to request a refund of any overpaid income tax under the year-end tax settlement procedure for payroll withholding tax, and will be able to delegate the year-end income tax settlement to the Korean company.

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[2]. INDIA – KEY AMENDMENTS TO THE FINANCE BILL, 2016 – *BY JAIRAJ PURANDARE, CHAIRMAN, JMP ADVISORS PRIVATE LIMITED, MUMBAI*

The Finance Bill, 2016 was presented in the lower house of the Indian Parliament on 29 February 2016. The amendments proposed in the Finance Bill will become law after these are passed by the upper house of the Parliament and receive the assent of the President of India.
Some key highlights of the Finance Bill, 2016 are discussed in this article.

- ***DIRECT TAXES***

Most direct tax proposals in the Finance Bill, 2016 are effective from FY 2016-17 unless otherwise specifically stated.

1. Tax rates

The basic rate of tax for Financial Year ('FY') 2016-17 for individuals remains unchanged. However, the rate of surcharge (which is levied on the amount of income tax) is proposed to be increased to 15% from the existing rate of 12%, if the total income exceeds INR 10 million (~ USD 150,000). In addition, education cess at 3% (on the amount of tax and surcharge) remains unchanged. This will take the effective rate of tax for such individuals to 35.535%.

The basic rates for domestic companies have remained unchanged. Newly set up domestic companies incorporated on or after 1 March 2016 and engaged in the business of manufacture will have an option to pay tax at a reduced basic rate of 25%. However, if this option is exercised, deductions and reliefs will not be available to such companies, except the deduction for emoluments paid to additional workmen employed.

Separately, for companies having turnover or gross receipts not exceeding INR 50 million (~ USD 750,000) in FY 2014-15, the basic rate of tax will be reduced to 29%.

The basic tax rates for foreign companies remain unchanged.

The basic rate of tax for Minimum Alternate Tax ('MAT')/Alternate Minimum Tax ('AMT') and Dividend Distribution Tax ('DDT') remain unchanged at 18.5% and 15%, respectively.

2. Taxation of dividend income exceeding INR 1 million (~ USD 15,000)

Currently, where a dividend is paid by an Indian company, the company is required to pay DDT on the amount of dividend and therefore such dividend is exempt in the hands of the recipient, whether resident or Non-Resident ('NR'). It is now proposed to tax dividends received by resident individuals and firms in excess of INR 1 million (~ USD 15,000) at 10% on gross basis. This provision will amount to the same income being taxed thrice (corporate tax, DDT and proposed tax of 10%). Thus, this will effectively result in 'triple jeopardy'.

This provision also discriminates between non-residents and residents. Further, it will adversely affect promoters holding shares directly and may lead to disputes on the question of taxability of dividend in case of taxable non business trusts who receive dividend exceeding INR 1 million (~ USD

15,000), even if the share of an individual beneficiary is less than INR 1 million (~ USD 15,000).

3. Provisions relating to Non-Residents

- *Equalisation levy to tax B2B e-commerce transactions*

It is proposed to levy 6% on the gross amount of consideration for specified services received or receivable by a NR (who does not have a PE in India) from residents in India carrying on business/profession, or NR having a Permanent Establishment ('PE') in India.

No levy will be charged if the NR providing the specified service has a PE in India and the specified service is connected with such PE or where total consideration received/receivable by the NR does not exceed INR 0.1 million (~ USD 1,500) in any FY or where services are not for the purpose of carrying on business or profession. Income on which Equalisation levy is charged will be exempt from income tax.

The payer of the consideration which is subject to Equalisation levy will be required to deduct the Equalisation levy from the amount payable to a NR. If no deduction is made by the payer, the entire consideration will be disallowed in computing the income of the payer.

Procedure for collection of levy, interest, penalty and prosecution are in *pari-materia* with withholding tax provisions under the Income-tax Act, 1961. The proposed amendment will be effective from a date to be notified by the Government of India.

This provision is introduced to bring the transactions relating to digital economy under the tax net and is based on the BEPS actions recommendations. The income from digital economy transactions was hitherto not taxable in India in accordance with the DTAA in view of the fact that the foreign entities did not have a PE in India. However, these transactions are also sought to be taxed now. Further, the amount of Equalisation levy paid in India may not be available as a credit in the home country of the NR, as this amount is *per se* not a 'tax' under the Income-tax Act, 1961.

- *Tax incentives to International Financial Services Centre ('IFSC')*

Certain tax exemptions are proposed to be provided to entities set up in an IFSC, to promote the growth of IFSCs into international financial hubs.

Securities Transaction Tax ('STT') will not be payable on transactions in securities undertaken on a recognised stock exchange located in an IFSC. Further, exemption from Long Term Capital Gains ('LTCG') will be extended to transactions undertaken in foreign currency on a recognised stock exchange by an entity located in an IFSC, even if no STT is paid on such transactions.

MAT will be applicable at a reduced rate of 9% to companies located in an IFSC, if income of such companies is derived solely in foreign exchange.

No tax will be levied on distribution of profits by a company located in an IFSC and deriving income solely in foreign exchange. Further, such dividend income will not be taxable in the hands of the recipient.

- *Applicability of MAT on foreign companies for the period prior to 1 April 2015*

It has been clarified that MAT will not be applicable to foreign companies with effect from FY 2000-01, if the foreign company, is a resident of a country or specified territory with which India has a Double Taxation Avoidance Agreement ('DTAA') and such company does not have a PE in India, or if such company is a resident of a country with which India does not have a DTAA and such company is

not required to seek registration under Companies Act in India.

The issue of applicability of MAT on foreign companies has been a contentious issue for long and therefore this clarification is a welcome relief for foreign companies.

- *Rationalisation of withholding tax provisions for Categories I and II Alternative Investment Funds ('AIFs')*

Income of the fund (not being in the nature of business income) will be exempt in the hands of the fund but income received by the investor from the investment fund (other than specified income which is taxed at the fund level) will be taxable in the hands of investor in the same manner as if the investment were made directly by investor.

The person responsible for making the payment to the investor shall deduct income-tax at the rate of 10% where the payee is a tax resident and at the rates in force when the payee is a NR.

A certificate for deduction of tax at a lower rate may also be obtained from the Tax Officer.

This proposed amendment will be effective from 1 June 2016.

- *Country by Country ('CbC') reporting*

In line with the BEPS recommendations on transfer pricing, the implementation of a three tier structure for transfer pricing documentation and CbC reporting will be incorporated. Specified information will be required to be reported in the prescribed formats, if the consolidated revenue of the MNE group exceeds the notified threshold.

CbC reporting would involve the following:

- Local file – containing material transactions of the local taxpayer
- Master file – containing standardised information relevant for all multinational enterprises (MNE) in the group
- CbC reporting – containing information about global allocation of MNE group's income and taxes, along with the location of economic activity within the MNE group

- *Exemption of income of foreign company accruing from storage and sale of crude oil*

Income accruing or arising to a foreign company on account of storage of crude oil in a facility in India and sale of crude oil therefrom to any person resident in India will be exempt provided that such storage and sale by the foreign company is pursuant to an agreement entered into by the Government of India/approved and notified by the Government of India.

The proposed amendment will be effective retrospectively from FY 2015-16.

- *Relaxation in conditions of special taxation regime for offshore funds*

The provision dealing with certain activities which are considered as not constituting business connection in India, is relaxed to include funds established or incorporated or registered in a country or a specified territory notified by the Government of India.

Further, the existing requirement of the fund not controlling and managing any business in India or from India has been further diluted to include only activities carried on in India.

- *Place of Effective Management ('POEM') and General Anti-Avoidance Rule ('GAAR')*

Applicability of POEM based residency test for foreign companies will be applicable from 1 April 2016. The due date of 1 April 2017 for implementation of GAAR will be adhered to.

- *Exemption from the requirement to furnish Permanent Account Number ('PAN')*

Tax withholding at a higher rate in the absence of PAN will not apply to NR or foreign companies for payment of interest on long-term bonds and any other payments, subject to conditions, as may be prescribed.

4. Tax incentives for Start-ups

Certain incentives are proposed to promote the growth of entrepreneurship and Start-ups. 100% deduction of the profits will be available to an eligible certified Start-up which has been incorporated after 31 March 2016 but before 1 April 2019 and is engaged in the business of innovation, development, deployment or commercialisation of new products, processes or services driven by technology or intellectual property. Such deduction would be available for any three consecutive FYs out of five years post the date of incorporation of the start-up.

LTCG will be exempt if it is invested after 31 March 2016 in units of a fund, notified by the Government of India, upto INR 5 million (~ USD 75,000). Further, exemption will be provided if the LTCG is invested in the subscription of shares of a company which qualifies as an eligible Start-up, subject to certain conditions.

5. Taxation of income from patents

A new section will be introduced to tax gross royalty income from a patent developed and registered in India at a concessional rate of 10%. However, MAT provisions will apply to such companies. This provision will apply to a person resident in India, and who is the true and first inventor.

6. Phasing out of deductions and incentives

Various profit linked deductions and exemptions as well as weighted deductions are proposed to be phased out. Further, the highest rate of depreciation will be restricted to 40% with effect from 1 April 2017.

7. DDT on distribution made by a Special Purpose Vehicle ('SPV') to a Business trust

DDT will not be applicable on distributions made by a SPV to Real Estate Investment Trusts ('REITs') or Infrastructure Investment Trusts ('InvITs'), holding prescribed shareholdings. Further, the dividend received by REITs or InvITs and their investors will be exempt from tax.

Exemption from levy of DDT will apply only in respect of dividends paid out of current income after the date of purchase of shares of the SPV by REITs or InvITs. This proposal is expected to give a boost to setting up of REITs and InvITs, which have not been very popular in India so far.

8. Amortisation of spectrum fees

A new provision is proposed to be inserted to provide for amortisation of the expenditure actually paid to acquire the right to use radio frequency spectrum for telecommunication services in equal instalments over the licence period.

9. Tax dispute resolution scheme

In order to reduce the huge backlog of cases, a new scheme for resolution of disputes will be

introduced. The scheme relates to 'tax arrears' in respect of matters pending before the first level appellate authority and 'specified taxes' in respect of pending matters relating to retrospective amendments, as on 29 February 2016 and provides as under:

Tax arrears

- If the declarant pays the entire disputed tax demand plus interest up to the date of the scrutiny order, it will be deemed that the appeal has been withdrawn and the taxpayer will get immunity from penalty and prosecution.
- If the disputed tax liability exceeds INR 1 million (~ USD 15,000), 25% of (minimum) penalty will be payable in addition to tax and interest.
- In case of pending appeals against a penalty order, 25% of (minimum) penalty will be payable in addition to tax and interest payable.

Specified taxes

- The taxpayer is required to pay the amount of disputed tax and will get immunity from interest, penalty and prosecution.
- The taxpayer has to withdraw the relevant appeal/notices/claims filed with any authority as may be applicable.

The proposed amendment will be effective from 1 June 2016.

10. Income declaration scheme, 2016

A new scheme will be introduced to provide an opportunity to taxpayers to disclose domestic undisclosed income of the period up to FY 2015-16. Tax will be payable at 30% on such income along with surcharge @ 7.5% and penalty @ 7.5%, resulting in an effective tax rate of 45%.

The proposed amendment will be effective from 1 June 2016 and will remain open till a date which will be notified subsequently.

11. Disallowance for expenditure incurred in connection with exempt income

Under the domestic tax law, no deduction is allowed for expenses incurred in connection with earning income which is tax exempt. In the absence of one-to-one co-relation between exempt income and the expenditure specifically incurred to earn this income, the Tax Officers generally disallow a part of the total expenses claimed as a deduction by the taxpayer, on the basis of a formula for computing the disallowance, as specified in the tax law. As a result of the said computation, in some cases, the amount of disallowance computed by the Tax Officers was higher than the actual expenditure incurred. Therefore, deduction for expenditure incurred in connection with exempt income was a major area of controversy and litigation.

As per the announcement in the budget speech, disallowance of expenditure incurred for earning exempt income would now be computed at 1% of average monthly value of investments yielding exempt income but will be restricted to the actual expenditure. The rules in this regard would be notified subsequently.

This proposal is a welcome relief and will hopefully resolve much of the litigation surrounding this issue.

12. Various other measures are proposed with a view to rationalize and simplify the taxation system and to make a transition towards a non-adversarial tax regime.

- ***SERVICE TAX***

1. A Krishi Kalyan Cess of 0.5% has been introduced with effect from 1 June 2016 on all taxable services. Thus, the effective tax rate on services will be 15% considering the basic rate of Service tax as well as the Swachh Bharat Cess ('SBC') of 0.5% introduced from 15 November 2015.

2. Service tax exemptions in respect of the following services are withdrawn:

- Construction services in respect of monorail and metro projects which will be taxed at a basic rate of 5.6% after abatement.
- AC Stage carriage will be taxed at a basic rate of 5.6% (in line with Service tax on contract carriage).
- Transport by cable car, ropeway and tramway is proposed to be taxed at 14%. This will make tourists pay more and hence, may be a retrograde step in so far as promoting India as a tourism destination is concerned.

3. Exemptions are given to the following services:

- Housing Projects under affordable Housing schemes (30 sq mts in four metro cities and 60 sq mts in other areas) from 1 March 2016.
- Services rendered by Pension Fund Regulatory and Development Authority/Employees Provident Fund Organisation/Insurance Regulatory and Development Authority of India and SEBI from 1 April 2016. Earlier, only services rendered by the RBI were exempt.
- Cold chain/biotechnology/vocational training and cultural projects of the Government from 1 April 2016.

4. Single premium insurance policy will attract Service tax at 1.4% as against 3.5% earlier, from 1 April 2016.

5. Service tax is levied on Indian shipping lines along with full input tax credit available so as to ensure their parity with foreign shipping lines.

6. Service tax is levied on receipt basis and payment of Service tax is made on a quarterly basis for One Person Companies ('OPC') and HUF.

7. The CENVAT credit rules have been amended to give an option to Banks and Financial Institutions to either reverse 50% of Input Tax Credit or reverse only part credit in proportion to their exempt service turnover vis-a-vis their total turnover.

8. A clarification is made that allocation of Radio Frequency Spectrum by the Government will be a taxable service and not a sale of intangible goods.

9. Further clarifications include mutual exclusivity of application of Service tax and Excise duty on one taxable event.

10. Interest rates and abatements have been rationalised in line with those applicable to Customs duty and Excise duty payments, except when the tax payer has collected and not paid the Service tax, in which case a higher rate of interest of 24% p.a. is prescribed.

11. The limit for prosecution for wrongful withholding of Service tax has been enhanced to INR 20 million (~ USD 300,000) from INR 10 million (~ USD 150,000) earlier.

12. The limitation period for short or under recovery of Service tax, when not attributable to fraud, collusion or misrepresentation, has been extended from 18 months to 30 months.

- ***EXCISE DUTY***

1. *An infrastructure cess in the range of 1 - 4% will be levied on all motor vehicles, based on engine capacity and length of vehicles.*
2. *Clean Environment cess will be increased from INR 200 (~ USD 3) per ton to INR 400 (~ USD 6) per ton.*

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ASIAN TAX AND TRADE NEWS AND UPDATES

SINGAPORE

[3]. HYBRID TAX CREDIT FRAMEWORK TO SPUR INNOVATION AND R&D, KPMG SAYS

A hybrid framework under the production and innovation credit (PIC) regime could be created to address the different needs that businesses have at different stages of development, KPMG recently said. A combination of targeted incentives could be offered.

KPMG said the hybrid framework would offer a combination of targeted incentives for different activities during the life journey of each Singapore business. The firm said the PIC scheme should allow each Singapore business to decide when it chooses to embark first on a 3-year incentive scheme to improve productivity.

In a recent pre-budget poll done by KPMG, 70% of the respondents said the current PIC scheme is not sufficiently effective. The firm said calibrating to the needs of a business in each step of development will help spur productivity growth and promote innovation.

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MALAYSIA

[4]. GOVT HAS NO PLANS TO REVIEW GST RATE

The Malaysian Government has no plans to review Malaysia's 6% GST rate as it considers the rate is reasonable, the Dewan Rakyat was told on 10 March 2016.

Bernama reported that Deputy Finance Minister Datuk Johari Abdul Ghani said prior to implementation of the GST, a detailed study had been made to ensure the rate was most suited to the prevailing economic conditions.

"Taken into consideration was the tax rate before the GST, that is, 10% for goods and 6% for services.

"At the same time, various other factors, including the composition of revenue from specific sectors, the tax burden on consumers, the income tax structure and assistance package to consumers and businesses was also taken into account, in line with the objective of creating a competitive tax structure," he added.

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[5]. CUSTOMS RELEASES REVISED GST GUIDE ON RETAILING

Royal Malaysian Customs has released a revised GST guide on Retailing (revised as at 11 March 2016). The 58-page Guide says that any retailer who makes taxable supplies (ie standard and zero rated

supplies) where the sales turnover in a 12 month period have exceeded the threshold of RM500,000 is liable to be registered under GST. However, any retailer whose sales turnover does not exceed the threshold of RM500,000 may apply to the Director General of Customs to be registered voluntarily.

The Guide goes on to cover a wide range of issues, including:

- GST Charged On Taxable Supply
- Price
- Price Display
- Recommended Retail Price (RRP) Goods
- Price Discount
- Discount Vouchers/ Discount Card
- Tax invoice
- Consignment sales
- Trade-in goods
- Commission agents.

For GST purposes, the chargeability of GST on the buy-back policy depends on the status of the distributor. The revised Guide says if the distributor is a registered person, he is required to charge GST on the supply of goods or products made to the Direct Selling Company (DSC). If the distributor is not a registered person, the supply of goods or product made to the DSC is not subject to GST.

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[6]. GOVT TO MONITOR TRANS-PACIFIC PARTNERSHIP AGREEMENT: TRADE MINISTER

The Malaysian Government will establish a National Committee to monitor, facilitate and oversee the overall implementation of the Trans-Pacific Partnership Agreement (TPPA).

International Trade and Industry Minister Datuk Seri Mustapa Mohamed said the committee would consist of representatives from ministries and government agencies involved with the TPPA.

The National Committee and subsidiary bodies to be established will mirror the set-up of the TPP Joint Commission and subcommittees under the trade agreement.

The Minister said he would continue to engage with members of Parliament in facilitating and monitoring the implementation of the TPPA.

At the same time, MITI's engagement with the local stakeholders will continue throughout the entire period before ratification. As part of the efforts to ensure that the engagement will continue during the implementation period, the Minister said a separate Consultative Committee will also be formed.

This committee will be made up of representatives from industry players, business chambers, small and medium enterprises, non-governmental organisations and various other local stakeholders. The role of this Consultative Committee will be crucial in gathering feedback and assessing the impact of the TPPA implementation from time to time.

The Minister said the Government remains committed in ensuring that Malaysia will be able to fully take advantage of the opportunities and mitigate the challenges that the TPPA will bring.

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[7]. REVENUE BOARD TARGETS RM118.5 BILLION IN DIRECT TAX COLLECTIONS THIS YEAR

The Inland Revenue Board (IRB) expects to collect RM118.5 billion in direct taxes this year as compared to the earlier target of RM125.6 billion, the Dewan Rakyat has been told.

Bernama reported that, in reply to Dr Ko Chung Sen (DAP-Kampar) during question time, Deputy Finance Minister Datuk Chua Tee Yong said the target was set in accordance with the recalibration of the Budget 2016.

He said last year, the IRB collected about RM111.8 billion in direct taxes which comprised individual, corporate and cooperative income taxes; petroleum income tax for upstream petroleum industry, stamp duty and tax on land values.

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PHILIPPINES

[8]. LUXURY SPORTS UTILITY VEHICLES IMPORTER CHARGED WITH TAX EVASION

The Bureau of Internal Revenue (BIR) has advised that it has filed a criminal complaint with the Department of Justice against an importer of luxury SUVs for Willful Attempt to Evade or Defeat Tax, and Failure to File his Income Tax Returns (ITR) for taxable years 2012 and 2013, all in violation of ss 254 and 255 of the National Internal Revenue Code of 1997, as amended (Tax Code).

BIR said the importer is engaged in the business of importation of “Luxury Sports Utility Vehicles (SUVs)” from the United Arab Emirates (UAE) by certain entities.

In the course of the investigation, an access letter was sent to the Bureau of Customs (BOC) requesting for a summary of importations made by the respondent. In reply, the BOC issued a letter with an enclosure containing the required information indicating, among others, total importations made in the name of the importing entity of P654.32 million in 2012 and P163.76 million in 2013.

After an evaluation and comparison of all data gathered, investigators found that the respondent had regularly made importations amounting to hundreds of millions of pesos without declaring any income or source of income from 2012 to 2013. Evidently, in the absence of any declared source of the expenses he incurred in his importations, the BIR said the amounts constituted unreported income and must be subjected to income tax.

Applying the expenditure method of investigation, the BIR established that the undeclared income of the importing entity was P654.32 million in 2012 and P163.76 million in 2013. As a result of his acts and omissions, the importer was assessed an estimated total income tax liability in the sum of P532.90 million, inclusive of surcharges and interest, broken down into: 2012 -P434.67 million; and 2013 - P98.23 million.

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THAILAND

[9]. HARSHER PENALTIES FOR OVERSTAYING VISAS AND NOTIFICATION BY BUSINESSES HOSTING FOREIGN VISITORS

The Thailand Immigration Bureau has published a Minister of Interior Order which will be enforceable from 20 March 2016. The Order imposes penalties on those overstaying their visas, including bans from re-entering Thailand, and requires businesses hosting foreign visitors to notify the Bureau of their arrival.

EY says that due to security concerns and abuse of the current system by some visitors, the Minister of Interior has issued an Order whereby visitors overstaying their visas will be refused re-entry to Thailand for a period of up to 3 years.

Under the Thai Immigration Act "*House owners, heads of household, landlords or managers of hotels who accommodate foreign nationals on a temporary basis must notify the local immigration authorities within* ***24 hours*** *from the time of arrival of the foreign national*."

According to EY, the Immigration Bureau has recently issued a reminder of this requirement to notify the authorities of the arrival of foreign nationals which carries a fine of up to Baht 10,000 (US$280) for non-compliance. Notification is to be made by managers of licensed hotels, and the owners of guesthouses, apartment buildings and rented houses using the form TM.30.

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VIETNAM

[10]. TAX COLLECTION INCREASES ATTRIBUTED TO ENHANCED AUDITS

While the decrease in crude oil prices in 2015 adversely affected Vietnam's state budget, information from the Ministry of Finance reveals that revenue collection increased by almost 8%, with this increase in revenue being attributed to aggressive and expanded tax audits (in particular, audits involving transfer pricing issues), increased recovery of tax debts, and newly crafted tax policies designed to increase tax revenue.

KPMG said the Government in 2016 has introduced or is expected to introduce measures to strengthen the tax laws and policies and to increase tax revenue collection. Already, the Ministry of Finance has submitted to the National Assembly amendments relating to the value added tax (VAT) law, the special consumption tax, and the tax administration law. The National Assembly is expected to consider these measures during its 20 March 2016 session. If approved, KPMG says it is expected that this would be followed by the issuance of new sets of tax decrees and circulars to implement the legislative changes.

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[11]. VIETNAM LEVIES NEW TARIFF ON IMPORTED MSG

The Vietnam Competition Authority (VCA) recently announced that the Ministry of Industry and Trade had released protective measures against monosodium glutamate (MSG) imports in an effort to protect local production that had been affected by the influx of cheap imports, *Tuoi Tre News* said.

Imports, with the exception of products from developing countries such as Angola and Myanmar whose MSG exports account for less than 3% of Vietnam's total imports, will have to pay an extra tax of roughly VND 4.39 million (US$197.38) per metric ton starting on 25 March 2016. The rate, currently at 20%, will be annually reduced over the next 3 years and by 25 March 2020 will be dropped to 0% unless the safeguard measure is extended.

Vedan (Vietnam) Enterprise Co. Ltd., an MSG producer, requested an investigation on MSG imports in June 2015 with a complaint that the country's MSG market was being dominated by imported products which poses a serious threat to domestic producers.

According to 2014 statistics cited in Vedan's complaint, the majority of MSG imports in Vietnam are from China at 76% of the total imports, followed by Thailand at 13% and India at 11%. Consumption of domestic MSG slid from 91% in 2012 to 69% in 2014 as imports on MSG rose from 9% in 2012 to 31% in 2014. The complaint added that Chinese MSG was sold at 47% of the average retail price of Vedan, leading to unhealthy market condition.

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CHINA

[12]. SAT GIVES MAJOR UPDATE ON CHINA'S INTERNATIONAL COOPERATION IN TAXATION, INCLUDING BEPS

The State Administration of Taxation (SAT) has released on its website an update of China's actions on international cooperation in taxation.
While noting the major BEPS developments, the SAT said that in China, the Multilateral Convention on Mutual Assistance in Tax Collection and Administration was approved by the National People's

Congress. The Standard for Automatic Exchange of the Tax-related Information under the Financial Account was approved by the State Council and the agreements between competent authorities were executed. The Plan for Deepening the Reform of State and Local Tax Collection System approved by the central government stipulated further cooperation in international taxation.

The SAT said it had also established the G20 group for taxation reform and set out 37 tasks to be completed within specific deadlines according to a specific roadmap, of which 26 have been completed ahead of schedule and the rest, including the introduction of achievements on BEPS during the revision of Taxation Law and Individual Income Tax Law, have been prioritised as the main tasks in 2016 through combining the Plan for Deepening the Reform of State and Local Tax Collection System, with detailed division of labour.

In terms of multilateral cooperation, SAT said China's taxation authorities proactively engaged in the development of the taxation rules of the United Nations and G20 countries, fully participated in the implementation of all the action plans for addressing BEPS, and put forward the general principle that profits should be taxed in the place where business operations take place or value is created which was accepted by G20 countries, providing almost 1,000 pieces of advice and comments for BEPS project and thus actively contributing to the establishment of new international taxation rules and system.

In terms of bilateral cooperation, China continued to expand the taxation convention network and help other developing and lower-income countries increase their capabilities in tax collection and administration. China also implemented 12 multilateral and bilateral cooperation projects by means of legislation consulting and technology aid and launched 2 sessions of seminars on tax collection and administration and taxpayer service for 82 tax officials from 18 African and Latin American countries, resulting in further cooperation between China and African as well as Latin American countries.

As the Asian Infrastructure Investment Bank was established and the strategy of the Belt and Road Initiative was comprehensively implemented in 2015, SAT said taxation has become a major challenge faced by companies in cross-border investment. The SAT issued the Notice on Improvement of Tax Service and Administration in accordance with the Strategy of the Belt and Road Initiative to carry out 10 specific measures around taxation conventions and tax service to promote China's opening-up strategy.

In April 2015, Wang Jun, Administrator of the SAT, signed the Agreement on Taxation Cooperation for Joint Oil and Gas Exploration and Exploitation in Beibu Gulf between China and Vietnam on behalf of the Chinese government during the meeting of party chiefs of the 2 countries in Beijing. The agreement is a solution to the definition of the tax jurisdiction of China and Vietnam for exploration and exploitation of offshore oil and gas resources, SAT said.

In 2015, China signed DTAs and Protocols with Russia, Chile, and Romania.

In October 2015, Wang Jun, Administrator of the SAT signed the China- Zimbabwe Taxation Treaty on behalf of the Chinese government during the visit of President Xi Jinping to Zimbabwe, significantly boosting China's investment in Zimbabwe by largely decreasing the tax burdens of China's investors in Zimbabwe.

The SAT said it also enhanced cooperation with the Netherlands, Mongolia, Ethiopia and BRICK countries to open special channels for the handling of international taxation disputes based on the bilateral negotiation mechanism under taxation conventions. SAT also conducted over 190 bilateral negotiations with relevant countries, which avoided international double taxation of more than RMB 20 billion for multinational companies and thus recovered the losses of cross-border taxpayers.

Crackdown on international tax avoidance, and BEPS

Based on the achievements of the BEPS Action Plan, the SAT said China has further refined its anti-tax avoidance laws and regulations. The Measures for Administration of General Anti-Tax Avoidance, the first action China takes to implement the achievements of the BEPS Action Plan, has been widely recognised in the international community, SAT said.

The Circular of Corporate Income Tax on Indirect Transfers of Assets by Non-resident Companies provides system-level solutions to the issues of tax avoidance by foreign investors through indirectly transferring China's assets. The Circular on Corporate Income Tax on Payments to Overseas Associated Enterprises by Domestic Enterprises effectively contains tax avoidance by MNCs through transferring the profits they make in China via paying large sums of money abroad. The Implementation Measures for Special Tax Adjustments, which follows the guidelines of the G20 tax reform, refers to the latest international ideas and approaches, and combines China's practices in international economic cooperation and anti-tax avoidance, is expected to become a practical anti-tax avoidance regulation promoting advanced approaches and technologies.

Over the past year, SAT said China's tax authorities have filed 265 anti-tax avoidance cases, of which 188 cases have been settled, contributing RMB 61 billion to the increase in tax revenue. They have established an anti-tax avoidance prevention and control system combining the functions of management, investigations and services, and conducted nationwide investigations into the automobile, luxuries and pharmaceutical industries, with zero tolerance to cross-border tax avoidance and “illegal profits” of companies.

The SAT said information-based approaches are the technological means for building an upgraded version of international taxation and the strong support for the modernisation of international taxation. Based on the overall layout of Golden Tax Phase III and tax modernisation, and the practical needs of international taxation administration, the SAT said it has developed the Information Technology Platform for International Taxation Administration, to conduct standardised management of international taxation analysis, and cross-regional collaboration and management, and to achieve IT-based non-resident tax administration, taxpayer service and management for foreign investments, information exchanges, anti-tax avoidance, taxation convention inquiry and cross-region cooperation, through data integration and processing. As of December 2015, the functions of the first phase of the platform had been developed and launched to technologically ensure international taxation administration.

Additionally, the SAT has established an MNC profit monitoring system to monitor the profits of MNCs by nationality, sector, region and the year, as well as a multilateral tax data service platform to lay a foundation for the implementation of the Standards for Automatic Exchange of Tax-related Information under the Financial Account.

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[13]. CHINA'S CIRCULAR ON NEW TRANSFER PRICING AND OTHER ANTI-AVOIDANCE RULES EXPECTED SOON

According to recent reports, the SAT is expected to issue a circular by May 2016 on the implementation measures for special tax adjustments that will update and replace Circular No. 2/2009. The circular will include new transfer pricing and other anti-avoidance rules based primarily on the outcomes of the OECD BEPS Project. It is understood the final circular will include amendments made to a draft version that was issued for public comment in September 2015 – see 2015 ATB 39.

The circular will cover a number of issues, including rules on:

- Controlled foreign companies (CFC).
- Thin capitalisation.
- Transfer pricing documentation requirements, including Country-by-Country (CbC) reporting with local filing requirements if an MNE group's CbC report cannot be obtained through exchange.
- New "other" transfer pricing methods, including a value contribution allocation method.
- Advanced pricing agreements (APAs).
- Cost-sharing agreements.
- Intangible asset return allocation.
- Royalty payment deduction limitations.
- Profit-level monitoring.

The intended effective date of the new circular is not yet known. Different rules may be effective from different dates, and retroactive effect may be possible.

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[14]. CPPCC PROPOSES REDUCING TAX BURDEN ON ENTERPRISES

The Chinese People's Political Consultative Conference (CPPCC) concluded its annual gathering in Beijing on 15 March 2016, having submitted more than 5,375 proposals to the central government, 42% of which focused on economic development.

The proposals included proceeding with supply-side economic reform, encouraging entrepreneurship and innovation, reducing the tax burden on enterprises, improving the quality of consumer goods and the service industry, and speeding up the implementation of the Free Trade Area strategy and the development of e-commerce in rural areas.

"It is our responsibility to submit valuable suggestions relating to the theme of building a moderately prosperous society," said Yu Zhengsheng, chairman of the CPPCC National Committee. "All members of the CPPCC should fulfill their duties by focusing on development during the 13th Five-Year-Plan (2016-20) period."

The proposals will be given to 164 government bodies to handle after the session, and the CPPCC National Committee will select key proposals to work together with related departments and individuals who make the proposals.

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[15]. CHINA'S NEW FIVE-YEAR PLAN AIMS TO BOOSTS GLOBAL SUSTAINABLE DEVELOPMENT

China's 13th Five-Year Plan (2016-2020), which experts see as critical in tiding the country through a transition period, is designed to create more opportunities for sustainable growth within and beyond its borders.

China's economy experiences different phases of its development cycle. It is now shifting its focus to consumption and service industries from heavy polluting industries and manufacturing via complex reforms, the experts said.

During the transition, a significant portion of the growth will be based on domestic consumption. The model is changing from "simple mass consumption to higher consumption," said Michael Zakkour, vice president of China/APAC at Tompkins International and author of "China's Super Consumers".

The increased importance of the Chinese consumers is not only to the Chinese economy but to the global one. Zakkour said this is providing huge opportunities for companies and governments investing in China.

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[16]. TAX REVENUE FROM CERTAIN INDUSTRIES GROWS

The SAT has advised that, according to the data on tax revenue collected by China's tax authorities in 2015, contributions from some industries such as high-end equipment manufacturing, pharmaceuticals, science research and technical service, and emerging information industry to China's tax revenue grew rapidly. SAT says this, indicates that these industries have maintained strong development momentum and the Chinese government's innovation-driven development strategy and policy measures to support mass entrepreneurship and innovation have produced good results.

Tax revenue from some high-end equipment manufacturing industries grew rapidly. In 2015, China's tax authorities collected RMB 11.0604 trillion in tax revenue (export tax refund adjusted), 6.6% higher than the previous year. For example, tax revenue from the electric machinery and equipment manufacturing industry increased by 8.3% to RMB 187 billion, 3 percentage points higher than that of the manufacturing industry. In particular, the tax revenue from the electric apparatus manufacturing industry in the industrial clusters of Jiangsu, Zhejiang and Guangdong accounted for 57% of the country's total, up by 10.6%.

In 2015, the tax revenue from the pharmaceutical industry increased by 13%, 7 percentage points higher than that of the manufacturing industry.

SAT said leasing and business service is an industry of a high level of innovation. For example, finance leasing products are more diversified and the business service sector is composed of technology-intensive industries such as legal, consulting and IPR services. In 2015, the tax avenue from the tertiary industry increased by 7.6%. The leasing and business services industry contributed RMB 582.2 billion to China's tax revenue, which was up by 23.8%, marking an increase for the third consecutive year. The corporate income tax grew by 40.9%, suggesting significant increase in the profits of enterprises.

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[17]. FINANCIAL REFORM "UNDER DISCUSSION": CENTRAL BANK

Reform of China's financial regulation system is under discussion, Zhou Xiaochuan, central bank governor, said on 12 March 2016.

"I am listening to inputs from all sides," Zhou said at a press conference on the sidelines of the annual Parliamentary session.

Significant fluctuations in China's stock market last year led many to reflect on the country's financial oversight. There is no global consensus regarding the system for financial oversight, Zhou said.

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HONG KONG

[18]. TRADE ACTIVITIES OUTSIDE HONG KONG: PROFITS ASSESSABLE TO PROFITS TAX IN HONG KONG – *CASE NO D25/14*

The Inland Revenue Board of Review has held that profits tax was chargeable on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets). Profits arising in or derived from Hong Kong included "all profits from business transacted in Hong Kong, whether directly or indirectly or through an agent": *Case No D25/14*.

The Appellant was incorporated in Hong Kong in 2001. In 2002, the Appellant became the sole owner of Company M (a sole proprietorship formed in the PRC), whose business was material processing and products exportation. In 2004, Company E (a company incorporated in Taiwan) became the ultimate controlling share-holder of the Appellant.

The trading between the PRC and Taiwan had to be performed through the Appellant. In terms of operation, the staff of Company E worked for all the companies within the group; Company E faxed the purchase orders to the Appellant from Taiwan, and the Appellant issued those orders to Company M; Company E provided the Appellant with the required materials, and the Appellant sold the materials to Company M for processing; the Appellant booked the prices of the materials together with the processing costs as the sale costs; since 2004, the Appellant booked the said costs separately as the sale costs of the materials, reflecting a trading activity of zero-profit; Company M purchased the materials from the Appellant for processing, and sold the products to the Appellant, which then sold the same to Company E.

In its tax return, the Appellant declared its major business as "investment holding and trading of hardware products", and further provided a business address in Hong Kong. However, the Appellant alleged that as a "middleman" between Company E and Company M, there was no production or sales activity in Hong Kong, and the substantive business and operation was entirely carried on outside Hong Kong, hence there was no profit or loss which could be declared in Hong Kong. The Appellant ultimately appealed to the Board.

After reviewing the matter, the Board held as follows:

- Profits tax was chargeable on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets). Profits arising in or derived from Hong Kong included 'all profits from business transacted in Hong Kong, whether directly or indirectly or through an agent'. In order to be chargeable to profits tax: (1) the person had to carry on a trade, profession or business in Hong Kong; (2) the profits must come from the trade, profession or business carried on by that person in Hong Kong; (3) the profits must arise in or derived from Hong Kong.

- The Appellant's activities proved that it had carried on substantial and important business ie connecting the trading activities between the PRC and Taiwan by playing the role of a "third party". Hence, although the Appellant's activities were not as busy as ordinary trading companies, the Board said it had some business and a role; it was also performing a very important and necessary task.

- The Appellant admitted that it derived profits from "purchase and sale of processed products". Hence, insofar as such business was concerned, the Board said Appellant's profits arose or were derived from the trade, profession or business that it operated.

- Regardless of the whereabouts of the controlling staff and the places where the contract was entered into and performed, the trading between Company E and Company M would become impossible in the absence of the Appellant. The activity of playing such role was obviously in Hong Kong, the Board said.

- The Board dismissed the Appellant's appeal.

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INDIA

[19]. FINANCE MINISTER EXPECTS PROGRESS ON GST BILL IN APRIL-MAY

India's Finance Minister Arun Jaitley says he expects lawmakers to make progress on a GST Bill and a bankruptcy law in the second part of Parliament's budget session that runs from 25 April to 13 May 2016.

According to Reuters, Jaitley said the government was also working towards bringing the tax regime on par with global levels.

"What is work in progress still is that we are trying to ease the environment for people doing business in India," Jaitley said, addressing the final leg of an International Monetary Fund event in New Delhi. The proposed Goods and Services Tax (GST) Bill would pave the way for a single market for goods in India for the first time.

The bankruptcy law is aimed at unifying and overhauling rules governing the liquidation or revival of ailing companies into a single code and for the first time imposing deadlines.

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[20]. CBDT RELEASES LATEST GUIDELINES FOR IMPLEMENTATION OF TRANSFER PRICING PROVISIONS

The CBDT has issued Instruction No. 3/2016 dated 10 March 2016 by which it has issued detailed guidelines for implementation of transfer pricing provisions. The CBDT has pointed out that due to a number of legislative, procedural and structural changes carried out over the last few years, Instruction No. 3 of 2003 was replaced with Instruction No. 15/2015, dated 16 October 2015.

After the issue of Instruction No. 15/2015, the Board received some suggestions and queries, which have been examined in detail. Accordingly, Instruction No. 3/2016 dated 10 March 2016 has been issued to replace Instruction No. 15 of 2015. This Instruction is applicable for both international transactions and specified domestic transactions between associated enterprises. The guidelines on various issues have been set out in detail.

While the New Guidance re-affirms that cases would be selected for audits based on “TP risk parameters” under the Computer Assisted Scrutiny Selection (CASS) system, EY notes that it also indicates circumstances under which cases would also be selected for audits manually. The New Guidance also clarifies that the primary responsibility for undertaking TP audits is that of specialized Transfer Pricing Officers (TPOs).

Some points from Instruction No. 3/2016 are:

- The power to determine the Arm’s Length Price (ALP) in an international transaction or specified domestic transaction is contained in sub-section (3) of s 92C. However, s 92CA provides that where the Assessing Officer (AO) considers it necessary or expedient so to do, he may refer the computation of ALP in relation to an international transaction or specified domestic transaction to the TPO. For proper administration of the Income-tax Act, the Board has decided that the AO shall henceforth make a reference to the TPO only under the circumstances laid out in this Instruction.

- All cases selected for scrutiny, either under the Computer Assisted Scrutiny Selection [CASS] system or under the compulsory manual selection system (in accordance with the CBDT’s annual instructions in this regard - eg Instruction No. 6/2014 for selection in FY 2014-15 and Instruction No. 8/2015 for selection in FY 2015-16), on the basis of transfer pricing risk parameters [in respect of international transactions or specified domestic transactions or both] have to be referred to the TPO by the AO, after obtaining the approval of the jurisdictional Principal Commissioner of Income-tax (PCIT) or Commissioner of Income-tax (CIT).

- Cases selected for scrutiny on non-transfer pricing risk parameters but also having international transactions or specified domestic transactions, shall be referred to TPOs only in the following circumstances:
  - (a) where the AO comes to know that the taxpayer has entered into international transactions or specified domestic transactions or both but the taxpayer has either not filed the Accountant's report under Section 92E at all or has not disclosed the said transactions in the Accountant's report filed;
  - (b) where there has been a transfer pricing adjustment of Rs. 10 Crore or more in an earlier assessment year and such adjustment has been upheld by the judicial authorities or is pending in appeal; and
  - (c) where search and seizure or survey operations have been carried out under the provisions of the Income-tax Act and findings regarding transfer pricing issues in respect of international transactions or specified domestic transactions or both have been recorded by the Investigation Wing or the AO.

- Since the provisions of s 92CA of the Act, inter-alia, refer to the computation of the ALP of the international transaction or specified domestic transaction, it is imperative for the AO to ensure that all international transactions or relevant specified domestic transactions or both, as the case may be, are explicitly mentioned in the letter through which the reference is made to the TPO.

- The TPO's order should contain details of the data used, reasons for arriving at a certain price and the applicability of methods.

- It is to be ensured by the CIT (TP) that the references received from the AOs by the TPOs in his jurisdiction are dealt with expeditiously and accurate record of all events connected with the whole process of determination of ALP is maintained.

Implications

In EY's view, the New Guidance issued by the CBDT for selection of cases for TP audits can be expected to result in more targeted and more cost-effective use of limited resources from a tax administration's perspective. The firm says it might be expected that the audit proceedings will be more detailed and intensive, especially given that senior TPOs are expected to handle a limited number of complex cases.

While the New Guidance does not identify the TP risk parameters that would be considered by the AO, EY says taxpayers may need to keep in mind the typical factors that may suggest a TP risk in the Indian context, such as payments for intra-group services and use of intangibles, significant transactions with related parties in low tax jurisdictions, intangible transfer transactions, business restructurings, loss making operations, significant advertising, marketing and promotional spend, excessive debt and entities characterized as limited risk. Accordingly, disclosures/reporting Form 3CEB would not only be relevant from a penalty perspective, but also from an audit risk perspective, in light of the New Guidance.

The low monetary threshold for compulsory TP audits in India has always been a concern, EY said, as historically, a large number of small and medium enterprises have been caught in the audit cycle. This has also put pressure on the tax authorities who are constrained in resources while carrying out an audit. The issuance of clarifications and instructions by the CBDT is consistent with the Government's objective of minimizing tax litigation and creating a non-adversarial tax regime.

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[21]. FEES FOR TECHNICAL SERVICES AND STARTUP SERVICES; NO PE IN INDIA - *RAYTHEON EBASCO OVERSEAS LTD CASE*

The ITAT Mumbai has held that "startup services", though technical in nature, are not assessable as "fees for technical services" (FTS) under s 9(1)(vii) if they do not involve any "construction, assembly mining or like projects". The services are also not taxable under Article 12 as they do not "make available" technical knowledge: *Raytheon Ebasco Overseas Ltd v DCIT*.

The case involved the 1998-99 assessment year. The assessee won a bid put out by Jindal Tractebel Power Company Limited (JTPCL) to install a power plant in Karnataka. The assessee was responsible for carrying out procuring of plant and equipment, basic engineering, review of detailed engineering and construction work at site including erection and commission of the plant.

The assessee submitted before the AO that the overall responsibility and management of the project was carried out by the assessee from outside India, that no Permanent Establishment (PE) was created in India, that the amounts received by the assessee for undertaking overall responsibility did not amount to transfer of technology/technical knowhow to JTPCL, and that no technical services/included services were provided by the assessee to JTPCL as envisaged by the Act/DTA. It was further argued that in the case of supply of equipment and essential spares, no part of the activities was carried out in India. With regard to technical services, it was stated that the entire conceptualisation of the project took place outside India, that the amounts payable related to the services rendered was to be paid outside India, and that there was no consideration for any right/property/information used for the purpose of business carried on by such person in India.

The AO held that as per se 9(1)(vii) and Article -12(4)(b) of India-US DTA, the place that was relevant for taxation purposes was the place where the services had been actually utilised, and that if the fee received by the assessee was for the services utilised in India, income would deem to accrue and arise in India.

The AO directed that tax be deducted from payments made to the assessee. During the assessment proceedings, the AO held that income amounting to Rs.130.96 Crores was taxable under the head FIS (fee for included services) as per the provisions of Article 12(4)(b)of the India-US double tax agreement (DTA) r.w.s.9(1)(vii),that the FAA upheld the order of the AO. This was upheld by the CIT(A). The assessee appealed and the Tribunal allowed the assessee's appeal.

The Tribunal said it was of the opinion that technical services or the start-up services, provided by the assessee, did not include any construction, assembly mining or like projects and therefore the payment received by it would not constitute FTS as per the provisions of the Act. The Tribunal referred to the Madras High Court decision in *Neyveli Lignite Corporation* (243 ITR 459). In that case, the assessee was engaged in the mining of lignite. It had entered in to an agreement with a Hungarian company for acquiring steam generating plant for more efficient running of its business. The AO held that income had accrued to Hungarian company in India and hence the Indian company was liable for deduction of tax. The Court decided the issue in favour of the assessee and held that receipts could not be brought to tax in India, that the payments made by it were not taxable under the provisions of s 9 of the Act.

As to whether the services rendered by the assessee could be termed FIS as per the provisions of Article 12 of the double tax agreement (DTA), the Tribunal said it was clear that to be classified as FTS, the services should enable the service receiver to carry out services by obtaining the technical knowledge/ experience/ skill possessed by the service provider. It is possible that the service provider may utilise its own technical knowledge in providing the services but that in itself would not render the services being treated as making available to the service receiver. If the twin test envisaged in the judgment of *De Beers India Minerals(P)Ltd*. (346ITR467) is applied to the facts of the case, the Tribunal said it had to be held that perusal of the contracts, entered into by the assessee with JTPCL, reveal that the services provided by it under the contracts did not in any way make available technical knowledge and experience skill or know-how to the Indian Company. It had supplied the equipments

to Indian company outside India, so the payments made by JTPCL to the assessee would not constitute FTS, as per Article 12 of the Treaty.

The Tribunal also held that the assessee did not have a PE in India.

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[22]. INCOME RECEIVED BY NON-RESIDENT UNDER TIME CHARTER AGREEMENT ARISES IN INDIA - *SIEM OFFSHORE CREWING* CASE

The ITAT Delhi has held that income received by a non-resident under a time charter agreement accrues and arises in India even when the vessel and crew are outside the territorial waters of India. Such income is assessable on a presumptive basis under s 44BB: *Siem Offshore Crewing AS v ADIT*.
The case involved the 2008-09 assessment year. The assessee is a non-resident company incorporated in Norway and derives revenue from Time Charter Agreement by providing crews on vessels. During the year under consideration, the assessee had shown gross revenues of Rs. 8,00,29,650/- on account of crew provision services. The Assessing Officer (AO) noticed that the assessee had not returned for tax purposes all the revenues earned by it from the contract for providing of crew on the ground that the revenues earned by it beyond 200 nautical miles from the Indian shorelines was not taxable in India and hence the revenue earned for the period during which the vessel was not in India was not taxable.

The AO considered that as the contract for providing of crew was a continuing contract, the income could not be segregated and claimed as non-taxable for the period the vessel was not in India. The AO was also of the opinion that under the scheme of s 44BB, the receipts were to be taxed on the basis of gross receipts. Secondly, the AO was of the view that the assessee was only providing management services and as such, the same was covered within the definition of fees for technical services (FTS) as envisaged in s 9(1)(vii) of the Income Tax Act, 1961. This was confirmed by the CIT(A). The assessee appealed.

The Tribunal dismissed the appeal.

The Tribunal said that gross payments are intricately linked to the services/works rendered by the assessee and arise due to the execution of contract in India, under the terms and conditions of the contract between the assessee and Siem Offshore Inc. The vessel was hired by the contract and it was only for this purpose that the vessel and the crew were involved in the contract. Thus, the Tribunal said it was improper on the part of the assessee to offer to tax its revenues only on a pro-rata basis based upon the number of days the vessel was stationed within 200 nautical miles from the Indian shore line.

As the contract for the provision of crew was a continuing contract, it cannot be said that revenues were not earned for the period the vessel was out of the territorial waters of India. Hence, the entire contract amount is to be considered for the purpose of calculating the gross receipts and all receipts received against the execution of the contract would come under the purview of gross receipts. Thus, gross amounts for the months of November 2007, December 2007 and January 2008 are to be included in the gross receipts.

The basic ingredient of s 44BB is that the non-resident assessee should be engaged in the business of providing services or facilities in connection with the prospecting or extraction or production of mineral oils. In the Tribunal's opinion, if a non-resident is engaged in the business of providing services or facilities in connection with the prospecting for extraction or production of mineral oil, then 10% of the aggregate of the amounts received/accrued will be deemed to be the profits and gains of such business chargeable to tax in terms of provisions of s 44BB of the Act.

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[23]. UNEXPLAINED INCOME; "BLACK MONEY" - *HASSAN ALI KHAN* CASE

The ITAT Mumbai has explained the law relating to the assessment of undisclosed income, based on disputed documents found in the premises of the assessee during a search: *Hassan Ali Khan v DCIT*.

The Tribunal also explained the law on admission of additional evidence sourced from foreign countries, onus of the assessee and onus of the revenue and the law on "telescoping" of additions.

The case concerned the 2001-02 to 2007-08 assessment years. It involved around 40 grounds of appeal concerning claims of unexplained income and various expenses claimed by the assessee.

The Directorate of Enforcement (the agency of the Government of India (GOI) that investigates the economic offences in India) had commenced an investigation under the provisions of the Prevention of Money Laundering Act, 2005 ('PMLA' for short), registering an Enforcement Case Information Report (ECIR) (bearing no. ECIR/02/M2O/2007) against the appellant. The ECIR relied heavily on a letter dated 8 December 2006 and certain statement of account stated to be received by the ED (Enforcement Directorate) from the Income-tax Department. In pursuance to the ECIR, the ED approached the designated court under s 57 of PMLA, seeking issuance of Letter Rogatory (LR) to various countries, being USA, UK, UAE, Singapore, Hong Kong, Switzerland for gathering information regarding the alleged financial transactions by the applicant.

The Tribunal said the Revenue, to proceed against the assessee, must have definite information with regard to the assessee being in possession of monies or holding investment. This is in view of the salutary principle of common law jurisprudence, embodied under s 110 of the Evidence Act, ie that possession implies ownership, so that the onus of proving that the possessor is not the owner is on the person so alleging. This principle is also applicable to tax proceedings, incorporated in the Act (under Chapter VI), so that the principle would be attracted to a set of circumstances that satisfies its conditions.

The Tribunal said the expression "income" under the Act, a term of wide import, is applicable to s 69A, among others, of the Act (refer: *Chuharmal v CIT* [1988] 172 ITR 250 (SC)). The Tribunal said the assessee, claiming to have no foreign bank accounts, conceded subsequently (on the basis of a report by UBS AG, Zurich – which has been taken as part of the record) to have a limited banking relationship with UBS AG, Zurich. The said report cannot be considered as completely reliable, the Tribunal said.

According to the Tribunal, the scope and ambit of the Act and the PML Act are completely different. Income, a word of wide import, is taxable under the Act irrespective of the manner of its earning, and the Act places no premium on the legality thereof, with which it is not concerned. The Courts have, rather, upheld bringing an amount to tax even on the basis of unjust enrichment (refer: *Shree Digvijay Cement Co. Ltd. vs. Union of India* [2003] 259 ITR 705 (SC); *Sinclair Murray & Co. P. Ltd. vs. CIT* [1974] 97 ITR 615 (SC)). Again, where the nature and source of any deposit in the assessee's bank account is not satisfactorily explained, the Tribunal said the law deems it as his unexplained income. This is based on the principle of common law jurisprudence, embodied in s 110 of the Evidence Act.

In the result, the Tribunal partly allowed the assessee's appeal.

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[24]. TRANSPORT, INTEREST AND POWER SUBSIDIES DEDUCTIBLE - *MEGHALAYA STEELS LTD* CASE

The Supreme Court has held that subsidies (such as transport subsidy, interest subsidy and power subsidy) paid to the assessee with the object of reducing the cost of production constitutes "profits derived from the business of the industrial undertaking" and is eligible for deduction under s 80-IB (the decision in *Liberty India* 317 ITR 218 (SC) was distinguishable on the facts, the Court said): *CIT v Meghalaya Steels Ltd*.

The case involved the 2004-05 assessment year. The assessee is engaged in the business of manufacture of Steel and Ferro Silicon.

The assessee had claimed a deduction under s 80-IB of the Income Tax Act on the profits and gains of business of the industrial undertaking. The assessee included the following subsidies in the profits and gains, namely, Transport subsidy, Interest subsidy and Power subsidy. The Assessing Officer (AO) held that the amounts received by the assessee as subsidies were revenue receipts and did not qualify for deduction under s 80-IB(4) and, accordingly, the assessee's claim for deduction on account of the 3 subsidies aforementioned were disallowed. This was upheld by the CIT(A) though reversed by the ITAT. The High Court also upheld the claim of the assessee (see (*CIT v Meghalaya Steels Ltd*. [2013] 356 ITR 235). The Department appealed to the Supreme Court.

The Supreme Court dismissed the appeal.

The Court said a series of decisions have made a distinction between "profit attributable to" and "profit derived from" a business. In one of the early judgments, namely, *Cambay Electric Supply Industrial Company Limited v Commissioner of Income Tax*, Gujarat II, (1978) 2 SCC 644, this Court had to construe s 80-E of the Income Tax Act, which referred to profits and gains attributable to the business of generation or distribution of electricity. This Court held that it could not be disputed that the expression "attributable to" is certainly wider in import than the expression "derived from".

In *Liberty India v Commissioner of Income Tax* 317 ITR 218 (SC)/ 2009 (9) SCC 328, what this Court was concerned with was an export incentive, which is very far removed from reimbursement of an element of cost. The Supreme Court said a DEPB drawback scheme is not related to the business of an industrial undertaking for manufacturing or selling its products. DEPB entitlement arises only when the undertaking goes on to export the said product, that is after it manufactures or produces the same. If there is no export, there is no DEPB entitlement, and therefore its relation to manufacture of a product and/or sale within India is not proximate or direct but is one step removed. Also, the object behind DEPB entitlement, as has been held by this Court, is to neutralize the incidence of customs duty payment on the import content of the export product which is provided for by credit to customs duty against the export product. In such a scenario, it cannot be said that such duty exemption scheme is derived from profits and gains made by the industrial undertaking or business itself.

The Court said that as regards the contention that as the subsidies that are received by the assessee would be income from other sources referable to s 56 of the Income Tax Act, any deduction that is to be made, can only be made from income from other sources and not from profits and gains of business, which is a separate and distinct head as recognised by s 14 of the Income Tax Act, it is not correct that assistance by way of subsidies which are reimbursed on the incurring of costs relatable to a business, are under the head "income from other sources", which is a residuary head of income that can be availed only if income does not fall under any of the other four heads of income.

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[25]. CBDT SETS UP DEDICATED STRUCTURE FOR RAPID RESOLUTION OF TAXPAYER GRIEVANCES

The CBDT has advised that it is setting up of a dedicated structure for delivery and monitoring of taxpayer services in the Income Tax Department.

The Board says the Income-tax Department is addressing grievances through a multi-layered grievance redressal machinery system including Centralised Public Grievance Redress and Monitoring System (CPGRAMS), Aayakar Seva Kendras (ASK), online grievance redressal through Central Processing Centre (CPC), etc.

Taking another step in this direction, the CBDT has issued an Order (ORDER No. 0l/Ad.VII/2016) setting up a dedicated structure for delivery and monitoring of tax payer services in the Income Tax Department. Member (Revenue and Tax Payer Services) will oversee the delivery and monitoring of taxpayer services in CBDT. Two separate Directorates, called Directorate of Tax Payer Services I and Directorate of Tax Payer Services II have been set up. Together, these Directorates will be responsible for delivery and monitoring of taxpayers services in the field offices and e-services deliverable through various electronic platforms of the Department. They will oversee and co-ordinate all matters relating to grievances of taxpayers and ensure their timely redressal. These Directorates will report to the Member (R and TPS), CBDT through the Principal Director General of Income Tax (Administration).

The Tax Administration Reforms Commission's (TARC) Report has also accorded considerable importance to redressal of grievances and a customer focussed approach in the Department through creation of a tax payer services vertical. The CBDT says the creation of this structure will fulfil some of the most significant recommendations of the TARC.

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[26]. INDIA APPROVES ENTERING INTO MOU WITH IMFTO SET UP SOUTH ASIA REGIONAL TRAINING AND TECHNICAL ASSISTANCE

The Union Cabinet chaired by the Prime Minister Shri Narendra Modi has given its approval for entering into the Memorandum of Understanding (MoU) between India and International Monetary Fund (IMF) for setting up of South Asia Regional Training and Technical Assistance Center (SARTTAC) in India by the IMF. It also authorised the Finance Minister to approve related decisions in respect of India's contribution for setting up of the centre, including Letter of Understanding for financial contribution by India, site of the SARTTAC, representative of India on the Steering Committee on SARTTAC, etc.

The SARTTAC will be a collaborative venture between the IMF, the member countries (that is Bangladesh, Bhutan, India, Maldives, Nepal and Sri Lanka) and development partners for supporting the capacity development needs of the members. Additional member countries could join SARTTAC at a later stage. SARTTAC will also selectively cater to the capacity building needs at the State level, especially in India.

The IMF is organising a Regional Conference on "Advancing Asia: Investing for the Future" in New Delhi. The MoU may be entered into during this Conference.
The MoU will help in capacity building of Government officials including state level in macro, fiscal, monetary policies by the IMF and greater coordination between the six member countries of South Asia.

Capacity development at Central and State level in fiscal and financial policies will enhance revenue mobilization and development of policies aimed at more effective public and financial management. This will result in economic development and inclusive growth in the country.

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JAPAN

[27]. PM ABE WILL INCREASE SALES TAX AS PLANNED, BARRING MAJOR CRISES

In the ongoing saga about increasing Japan's sales tax rate, Reuters has reported that Japanese Chief Cabinet Secretary Yoshihide Suga said that Prime Minister Shinzo Abe will increase the sales tax as planned next year, barring any major financial crises or natural disasters.

A prominent Abe advisor said recently that Abe should delay indefinitely the planned increase in the sales tax to 10% from the current 8% in April 2017 - or even cut the levy, given its potential impact on

already sluggish private consumption. See also 2016 ATB 10 [33].

Nobel laureate and economist Joseph Stiglitz said on 15 March 2016 he told Prime Minister Abe that Japan should not go ahead with the sales tax increase, *Reuters* reported.

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TAX AND TRADE NEWS OF WIDER INTEREST

BEPS NEWS

[28]. IMPACT OF BEPS AS TAX ADMINISTRATIONS GRAPPLE WITH IMPLEMENTATION

KPMG LLP's Mike Dolan has recently highlighted a number of areas where he believes BEPS implementation actions and demands of those actions are going to be particularly vexing. Mike is National Director of IRS Policies and Dispute Resolution, Washington National Tax, KPMG LLP.

Re CbC reporting (Action 13), Dolan says MNEs will be filing those reports in their countries of jurisdiction, and then those countries of jurisdiction, those jurisdictions of residence, will have to in turn take the data in, make sure it gets shared with other tax administrations, and proceed to act effectively on it themselves. He said that some countries, even if they don't require legislation, are "going to have to do some pretty wholesale internal provision of guidance and regulations".

He also warned that embedded in the CbC reporting proposal is a general concern for security. Mr Dolan said one of the primary drivers of tax administrations is going to have to be that the data when received is used exclusively for the risk assessment purpose it was designed. To the extent it deviates from that, you create an entire different world of concern, he said.

Concerning transfer pricing (Action items 8, 9 and 10), Dolan says the importance of consistency can't be overstated because to the extent that people pick and choose or deviate to any considerable extent from the recommended guidance, it is possible to end up with multiple jurisdictions presumably trying to lay claim to the same amount ie same items of income. He said that is untenable over the long term, both for tax administrations and for their taxpayers.

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EU NEWS

[29]. MULTINATIONALS AND TAX AUTHORITIES APPEAR BEFORE EU TAX RULINGS COMMITTEE

The EU Parliament's special committee on tax rulings discussed tax measures with representatives from multinationals and various tax authorities on 14 and 15 March 2016. Participants included Andorra, Liechtenstein, Monaco and the Channel Islands as well as corporations such as Apple, Google, IKEA and McDonald's.

The participants explained their practices and shared their views on the European Commission's Anti-Tax Avoidance Package as well as on an action plan by the OECD to prevent companies from artificially shifting profits to low or no-tax locations where there is little or no economic activity. Also, tax-related state aid verdicts and investigations by the Commission were discussed.

Although Apple, Google, IKEA and McDonald's agreed to explain their views in front of the committee, Fiat Chrysler and Starbucks declined, as did the Cayman Islands and the Isle of Man.

In a press release, the EU Parliament said Google, Apple, Inter-IKEA Group and McDonald's would welcome more clarity and certainty about their tax liabilities in the EU, but they are concerned about the administrative compliance costs and reluctant to see tax data being made public. So said their representatives at a public hearing, held by Parliament's Special Committee on Tax Rulings II on 15

March 2016, to elicit their views on recent and upcoming proposed legislation on corporate tax.

The anticipated common consolidated corporate tax base (CCCTB) and company specific tax structures - such as Google's “Bermuda” structure, IKEA's “royalties” one, Apple's tax arrangements in Ireland and McDonalds' franchises – were also subject to intense debate.

Google

Several MEPs criticised Google for paying too little tax in EU countries and said that its deal with the UK revenue service (HMRC), whereby it will pay £130m in back taxes and higher ones in future, shows that Google was ethically off track. Google's Head of Economic Policy, Adam Cohen, said that HMRC had looked into its transfer pricing arrangements and concluded that certain benchmarks needed to be adjusted. "That is normal for multinational companies", he underlined, adding that Google pays a global effective tax rate of 19% and that the EU's overall rate is around 20%.

Google has reservations about the Commission's Common Consolidated Corporate Tax Base (CCCTB) plans, which - Mr Cohen said - would increase costs for Google as it would require an establishment in every EU country. "This would be contrary to the principle of the internal market", he added.

Apple

"Apple is the largest taxpayer in the world. In 2015, we paid US$13.2 billion in taxes worldwide, which is an effective tax rate of 26.4%", its representatives said when asked about the company's tax structures in Europe and the state aid investigation launched by competition Commissioner Margrethe Vestager. However, they were not prepared to disclose its EU and Irish tax figures. "Those are confidential. When country-by-country reporting will become mandatory, we will of course follow". Apple, like Google, pays most of its taxes in the US, where most of its employees are based and its research is done.

McDonalds

McDonalds' Vice President for Corporate Tax Irene Yates welcomed the anti-BEPS proposal, saying it would create a "clearer, simpler and more consistent international tax regime". But “we are concerned about unilateral approaches [that will result] if the BEPS directives are not harmonised in a holistic manner. The idea should be to remove barriers to trade, not create new ones", she continued, adding that McDonalds is not in favour of public reporting by country: "Information should be kept confidential between tax authorities and not be made public. That could harm competition", she concluded.

Inter-IKEA Group

Inter-IKEA Group CEO Soren Hansen, came under fire from the Greens, who had presented research on the basis of which they accuse the company of dodging tax through royalty operations via the Netherlands and Liechtenstein. Mr Hansen said that some of the assumptions upon which the report was based were false, but that he would come back with a written assessment of the research. He also said that the anti-BEPS proposal should be aligned inside and outside the EU, that bureaucracy must be avoided and that a mechanism for rapid dispute settlement would be highly welcome.

Other matters

The Special Committee has asked Ireland to provide further details on the country's tax deal with Apple before deciding whether this constitutes illegal state aid to the iPhone maker. [Reuters said](#) that Apple's Vice-President of its European operations, Cathy Kearney, told a European Parliament hearing

on 15 March 2016 that the company had paid every cent of its taxes in Ireland.

Reuters reported that the European Commission, which has been investigating the Apple deal for more than 2 years, said that Irish authorities had not responded fully to an earlier query. "Ireland did not reply in full to the Commission's last request for information, which is why the Commission has sent a reminder to Ireland to request the missing data," Commission spokesman Ricardo Cardoso said in a statement. "Furthermore, the Commission has requested clarifications to follow up on some of the replies sent by Ireland," he said.

The Irish finance department said it has provided a detailed response, saying an EU ruling was not imminent. "There is simply no question that the Irish authorities sought to give the company in question any kind of special tax deal," a finance department spokesman said.

The Commission's investigations

The Commission is investigating ambitious tax deals between large multinationals and member states. Latest developments include the following:

- In January 2016, the Commission ordered Belgium to recover an estimated €700 million in unpaid taxes from 35 multinationals. The companies have benefited from a tax ruling scheme dubbed "only in Belgium", which the Commission considers to be a form of illegal state aid.

- In October 2015 the Commission released 2 decisions stating that Luxembourg and the Netherlands have granted selective tax advantages to Fiat Finance and Trade and Starbucks, respectively. The Commission considers these illegal under EU state aid rules.

- The Commission said its investigation into Ireland's tax treatment of Apple is ongoing. Last December, the Commission opened an investigation into Luxembourg's tax deal with McDonald's.

Tax inquiries are also hot topic in EU countries. For instance, Google and UK reached a settlement in January so that the tech giant will pay £130 million in retrospective taxes.

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[30]. EU CODE OF CONDUCT FOR BUSINESS TAXATION

As reported at 2016 ATB 10 [39], the EU economic and financial affairs ministers (ECOFIN) meeting on 8 March 2016 in Brussels reached political agreement on the exchange of tax information and a Code of Conduct for business taxation. A new Directive will require large companies to file country-by-country (CbC) reports on the taxes they pay.

In a report on the meeting, EY said ECOFIN reached the following conclusions on new rules:

- The Code of Conduct Group is recalled to develop guidance on the interpretation of the gateway criterion and its application.

- The Code of Conduct Group should actively use existing sub-groups and establish new sub-groups where appropriate.

- One subgroup will address clarification of the third and fourth criteria (ie substance and internationally accepted principles) of the Code of Conduct and another subgroup will address dialogues with relevant third countries.

- The High Level Working Party on Taxation is invited to decide on the need to request this

second sub-group at a later stage to address issues related to the communication on an external strategy for effective taxation.

- Guidelines, ie by reference to clear and objective criteria, for a notification of tax measures to the Code of Conduct group should be developed.
- Measures to speed up decision making within the group have been considered.
- The necessity to increase transparency is emphasised.
- More substantial 6-monthly Group reports to the ECOFIN are called for.
- The Code of Conduct Group should explore initiatives to further inform the public on the results of meetings.

Implications

By concluding the above, EY says the ECOFIN underlines that certain actions as proposed by the BEPS Action Plan should not be implemented by EU legislative acts. Rather, the Code of Conduct group should survey their respective implementation in the Member States from an EU perspective. EY says the conclusions reflect the approach that the Code of Conduct group could also address issues arising from the patent or intellectual property boxes concepts in the Member States. Hence, the approach the Code of Conduct group will take regarding such knowledge box concepts could have implications on the currently pending (or halted) scrutiny of some Member States' patent box concepts, the firm said.

By agreeing on the conclusions in relation to criterion 3 and 4, EY says the ECOFIN seems to underline that the Code of Conduct Group should be the EU's competent body to oversee the implementation of OECD BEPS Actions 5 and 8-10 within the EU's Member States. It should not stay disregarded that the ECOFIN stresses the development of guidance on the interpretation and application of the gateway criterion, too.

At the moment, the Code of Conduct applies to measures which provide for a significantly lower effective level of taxation than that which applies generally in an EU Member State. As hinted by the Code of Conduct Group last year, EY says this could be expanded to include measures which provide for a level of taxation below a particular effective tax rate. Hence, in relation to this, no final decision has been made yet, although it becomes clear that the scope of the Code of Conduct Group's work could be expanded in the future.

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[31]. ECOFIN TO MEET RE ANTI-TAX AVOIDANCE DIRECTIVE

A sub-group of the ECOFIN is scheduled to meet on 18 March 2016 to discuss the Anti-Tax Avoidance Directive (ATA Directive) on a working-level, *EY* said. As reported at 2016 ATB 4 [46], on 28 January 2016, the European Commission (EC) presented the Package Directive.

Another part of the anti-tax avoidance package, the proposed directive intends to "lay down rules against tax avoidance practices that directly affect the functioning of the internal market."

EY said the currently presiding Dutch Presidency seems committed to reaching a political agreement on the ATA Directive before its term ends on 30 June 2016, with plans for an agreement from all Member State's Finance Ministers about the proposal on 25 May 2016. To do this, the Dutch Presidency seems open to accept a split of the proposed ATA Directive.

The first-staged legislative proposal would involve a directive which focuses on measures which directly derive from the respective action points as suggested by the OECD BEPS action plan in October 2015, EY explained. This would include rules on controlled foreign companies taxation, interest limitation, hybrid mismatches and a general anti-abuse rule.

The second-staged legislative proposal would involve a directive which focuses on measures which go beyond the BEPS action plan. The latter measures would include rules on exit taxation and a switch-over clause, measures which are not addressed by the BEPS action plan but from work carried out in relation to a future Common Consolidated Corporate Tax Base.

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OECD NEWS

[32]. NEW GLOBAL FORUM PEER REVIEWS HIGHLIGHT INCREASING COMPLIANCE WITH TAX TRANSPARENCY STANDARDS

The OECD advised that world's leading forum on tax transparency published 10 new peer review reports on 14 March 2016, pointing to ever-increasing compliance with the internationally-recognised standards to curb tax evasion through the exchange of information.

The OECD said the new reporting from the Global Forum on Transparency and Exchange of Information for Tax Purposes demonstrates growing worldwide compliance with the international standard for exchange of information on request and deep engagement to push forward transparency objectives of the group. The Forum brings together 132 countries and jurisdictions on an equal footing to tackle offshore tax evasion.

The Global Forum published Phase 1 reports on Croatia and Tunisia, which assessed their legal and regulatory frameworks for transparency and exchange of information on request. These countries were assessed to have legal frameworks in place to enable them to move to Phase 2 of the review process, which will assess exchange of information practices.

Eight new Phase 2 reviews of exchange of information practices - for Botswana, El Salvador, Georgia, Kenya, Mauritania, Nigeria, Niue and Saudi Arabia - were also published by the Global Forum. It allocated ratings for compliance with the individual elements of the international standard, as well as an overall rating for each jurisdiction which is "Largely Compliant".

The Global Forum has now completed 225 peer reviews and assigned compliance ratings to 94 jurisdictions that have undergone Phase 2 reviews. The first round of reviews for all member jurisdictions will be completed by the end of 2016, as required under a 2009 mandate that governs the peer review process.

In a demonstration of the increasing relevance of its work and its reach, 3 new members joined the Global Forum in 2016 - Guyana, Chad and Maldives.

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UNITED KINGDOM

[33]. UK 2016 BUDGET: CORPORATE TAX RATE CUT; ACTION ON HYBRID MISMATCHES (BEPS ACTION 2)

The UK Chancellor of the Exchequer George Osborne delivered the UK's 2016 Budget to Parliament on 16 March 2016. Highlights include:

- ***Corporation Tax will be cut again to 17% in 2020*** - The main rate of Corporation Tax has already been cut from 28% in 2010 to 20%, the lowest in the G20. It will now be cut again to 17% for the Financial Year beginning 1 April 2020.

- ***Some large companies use excessive interest payments*** to reduce the tax they pay on their profits in the UK. Relief on interest payments will now be capped at 30% of UK earnings, with exceptions for groups with legitimately high interest payments.

- ***Hybrid mismatches (BEPS Action 2); royalty payments***: Over the next 5 years, the UK Government expects to raise nearly £8 billion from large companies and multinationals through changes to the rules on interest and other measures, including:
  - introducing rules to prevent multinational companies avoid paying tax in any of the countries they do business in, a technique called hybrid mismatches;
  - taxing outbound royalty payments better - these are fees for using intellectual property like patents and copyrights - meaning multinationals pay more tax in the UK;
  - making sure offshore property developers are taxed on their UK profits.

Those likely to be affected are large multinational groups with UK parent or subsidiary companies involved in cross-border or domestic transactions involving a mismatch in the tax treatment within the UK or between the UK and another jurisdiction. The Chancellor said the measure fully implements Action 2 of the G20/OECD BEPS Action Plan.

The measure neutralises the tax mismatch created by these arrangements by changing the tax treatment of either the payment or the receipt, depending on the circumstances.

The rules are designed to work whether both the countries affected by a cross-border arrangement have introduced the OECD rules, or just one. This measure deals with mismatches in 2 ways, described as a "primary response" and a "secondary response".

In the case of double deductions, the primary response is to deny a deduction to the parent company. If this does not occur (because the tax law in the country in which the parent company is resident does not provide for this), the secondary response is to deny the deduction to the hybrid entity or permanent establishment. In the case of deduction/non-inclusion, the primary response is to deny a deduction to the payer. If this does not occur, the secondary response is to bring the receipt into charge for the recipient.

- ***Transfer pricing guidelines to be updated*** – a policy paper was released that would update from 1 April 2016 the definition of "transfer pricing guidelines" (via legislation to be introduced in the Finance Bill 2016) to incorporate the revisions agreed to the OECD transfer pricing guidelines by the joint OECD/G20 BEPS project. The measure would amend the references within the UK relevant legislation to incorporate the most recent revisions to the OECD Guidelines which are the internationally agreed standard for application of the arm's length principle for transfer pricing purposes.

- ***Royalty withholding tax*** – Draft legislation was released to provide additional obligations to deduct income tax at source from royalties paid to certain non-resident persons effective from 17 March 2016. It would amend the rules in Part 15 of the Income Tax Act (ITA) 2007 on the deduction of income tax from payments of royalties by inserting new s 917A. It introduces anti-avoidance rules to prevent the abuse of double taxation arrangements to avoid the duty to deduct income tax from royalty payments made to connected persons. The measure will provide additional obligations to deduct income tax at source from royalties paid to non-resident persons where either:
  - arrangements have been entered into which exploit the UK's double taxation agreements (DTAs) in order to ensure that little or no tax is paid on royalties either in the UK or anywhere in the world;

  - the category of royalty is not currently one of those in respect of which there is an obligation to deduct tax under UK law;

- royalties which do not have otherwise have a source in the UK are connected with the business that a non-UK resident person carries on in the UK through a permanent establishment in the UK.

- ***New tax allowances for money earned from the sharing economy*** - From April 2017, there will be 2 new tax-free £1,000 allowances – one for selling goods or providing services, and one income from property owned. People who make up to £1,000 from occasional jobs - such as sharing power tools, providing a lift share or selling goods they have made - will no longer need to pay tax on that income. In the same way, the first £1,000 of income from property - such as renting a driveway or loft storage - will be tax-free.

- ***Overseas businesses not complying with UK VAT rules*** - measure are to be introduced to give HMRC strengthened powers, to tackle the non-compliance from some overseas businesses that avoid paying UK VAT on sales of goods made to UK consumers, via online marketplaces. The measure will have effect from Royal Assent to Finance Bill 2016. There are 2 aspects to this measure:

  - The first part makes changes to the existing rules which would allow HMRC to direct an overseas business to appoint a VAT representative with joint and several liability. The changes make this a more effective power and also give HMRC greater flexibility in respect of seeking a security.

  - The second part is the introduction of a new provision which will enable HMRC to hold an online marketplace jointly and severally liable for the unpaid VAT of an overseas business that sells goods in the UK via that online marketplace. Neither of these changes will apply automatically to any businesses and HMRC will use them on the highest risk cases to tackle non-compliance.

- ***Capital Gains Tax rates will be cut from 6 April 2016, but residential property will still be taxed at current rates*** - From April 2016, the higher rate of CGT will be cut from 28% to 20% and the basic rate from 18% to 10%. There will be an additional 8 percentage point surcharge to be paid on residential property and carried interest (the share of profits or gains that is paid to asset managers).

Tax support worth £1 billion for the oil and gas industry - This includes effectively abolishing Petroleum Revenue Tax (a tax on profits from oil fields approved before 1993) and dramatically reducing the supplementary charge on oil and gas extraction.

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AUSTRALIA

[34]. AUSTRALIA TO INTRODUCE TAX INCENTIVES TO BOOST STARTUP INVESTMENT

Australian Prime Minister Malcolm Turnbull has announced that the Australian Government has introduced legislation to stimulate greater investment in startups in the form of tax amendments as the country looks to transition its economy away from a slowing mining sector.

The ***Tax Laws Amendment (Tax Incentives for Innovation) Bill 2016*** was introduced in the House of Representatives on 16 March 2016. It proposes the following amendments:

- ***Tax incentives***: Amends the ITAA 1997 to encourage new investment in Australian early stage innovation companies with high growth potential by providing investors, who invest in such companies, by providing tax incentives. These incentives include a 20% carry-forward non-refundable offset on investments capped at AUD$200,000 per year, and a 10-year exemption

on CGT for investments held in the form of shares in the innovation company for at least 12 months, provided that the shares held do not constitute more than a 30% interest in the innovation company. The tax offset will be available upon investment, not when the funds are used by the innovation company, and any sale of the shares will be taxed on a "deemed capital account" basis. These amendments form part of the tax incentive for early stage investors measure. *Date of effect*: These amendments would apply in relation to shares issued on or after the later of 1 July 2016 or Royal Assent.

- ***Venture capital***: Amends the early stage venture capital limited partnership (ESVCLP) and venture capital limited partnership (VCLP) regimes within the *Venture Capital Act 2002* and ITAA 1997 to improve access to venture capital investment and make the regimes more attractive to investors. The amendments provide an additional tax incentive for limited partners in new ESVCLPs, relax restrictions on ESVCLP investments and fund size and clarify the legal framework for venture capital investment in Australia. Under the changes, there would be:
    - a non-refundable tax offset of 10% of the value of new capital invested into early stage venture capital limited partnerships during the income year;
    - an increase in the maximum fund size of early stage venture capital limited partnerships from AUD$100 million to AUD$200 million;
    - improved access to funding from managed investment trusts; and
    - broadened and simplified rules for both venture capital limited partnerships and early stage venture capital limited partnerships.
    - *Date of effect*: The amendments would broadly apply on and after 1 July 2016. However, the ESVCLP tax offset will be available for any qualifying contributions made to ESVCLPs that become unconditionally registered on or after 7 December 2015 ie the date the measure was announced in the Government's Innovation Statement.

The new tax laws were considered as key elements in Australia’s plan to encourage greater risk-taking, easing the pain of economic transition amid an end to the investment phase of a lucrative mining book that sustained its economy for over a decade.

"We have been from an economy that was fired up by the mining construction boom... but inevitably it was going to tail off so what comes next? What comes next is innovation," Turnbull said.

Reuters said data from the OECD showed that Australia had consistently ranked either last or second-last among OECD countries for business-research collaboration, its appetite for risk also ranking lower than comparable countries stating that Australian startups and early-stage businesses often fail to attract capital to grow.

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[35]. GOVERNMENT TO REVIEW PROPOSAL FOR "BACKPACKERS TAX"

Australian Minister for Tourism, Senator Richard Colbeck, announced on 16 March 2016 that the Government would review its plans regarding the so-called "backpacker tax". The Government said the review's scope will cover taxation and superannuation arrangements under the programme.

The change was announced in the 2015-16 Federal Budget in May 2015 and would see the tax residency rules changed to treat most people who are temporarily in Australia for a working holiday as non-residents for tax purposes, regardless of how long they are here. This means they would not be entitled to the tax-free threshold and would be taxed at 32.5% from their first dollar of income. The change has not yet been legislated.

Deputy Prime Minister Barnaby Joyce said the review would help ensure the right measures are in place to support the 2 key growth sectors of agriculture and tourism. "We know about 40,000 backpackers work in agriculture for a few months each year, the majority in horticulture at seasonal peaks," he said.

Assistant Agriculture and Water Resources Minister, Senator Anne Ruston, said the review will look at the proposed tax arrangements to ensure Australia does not lose important market share in backpacker visitation. "The clear aim is to make sure we have a balanced and equitable approach to the tax status for workers here on visas - we do not want to risk a slide into black market employment in agriculture and tourism," she said.

A number of tourism industry bodies have welcomed the Government's decision.

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[36]. AUSTRALIA AND INDONESIA TO RELAUNCH NEGOTIATIONS ON A FREE TRADE AGREEMENT

Australia's Minister for Trade, Steven Ciobo, made a Ministerial Statement to the Australian Parliament on 17 March 2016 on strengthening the economic relationship between Australia and Indonesia.

The Minister said Indonesia's Minister of Trade, Thomas Lembong, was in Australia to discuss concrete ways to expand and strengthen the economic relationship between the 2 countries. During discussions on 16 March 2016, Mr Ciobo said they formally agreed to relaunch negotiations on the Indonesia-Australia Comprehensive Economic Partnership Agreement - a broad based Free Trade Agreement (FTA). Mr Ciobo said: "Relaunch of these negotiations underscores the combined mutual interest of both of our nations. This trade agreement is an opportunity that is consistent with the Prime Minister's vision to drive jobs and to drive growth."

Indonesian Minister Lembong said: "I certainly share your excitement and optimism about the process we're now recommencing. I would like to add that this is a direct result of the excellent chemistry between President Jokowi and Prime Minister Turnbull. I think we're all benefiting from having two very business-minded leaders leading our two countries, and, I would add, that I'm struck by the vibrancy and the freshness that I think both leaders and so far both sides in this negotiation have brought to the table."

The Australian Minister said he believe an FTA with Indonesia can mark a radical shift in the trade and investment ties. This shift will result from a realisation of the opportunities Indonesia represents for Australian business. He said Indonesian consumers are looking for the premium, clean and green food and beverages that Australian farmers are renowned for. Indonesians want quality education for their children. As the third largest global provider of education services, Australia's reputation for providing these services is proven. In addition, Australian healthcare providers can help Indonesia develop world-class healthcare services. Similarly, Australian financial services companies, professionals and ICT service providers have the expertise to help grow Indonesia's own services sectors.

Mr Lembong said he was "hopeful that we can go beyond last generation trade talks and really be very forward-looking to 21st Century issues like the digital economy, the services sector, which as you and Prime Minister Turnbull have pointed out, results in the highest quality jobs for both Australians and Indonesians."

One of the additional measures that were launched is reactivation of the Indonesia-Australia Business Partnership Group. In 2012, the group drafted a report including 53 recommendations on areas where Australia and Indonesia could strengthen their economic relationship. The group has been asked to revisit and update their recommendations to feed into the negotiations, which have recommenced. The business partnership group will be a key driver of the ambition that both countries share for the high level of business engagement that we want for these negotiations, Mr Ciobo said.

The 2 Ministers have also agreed to work towards some early outcomes. In view of the non-traditional nature of this agreement, early work will look at outcomes in the design and culinary areas, as well as possible outcomes in agriculture and skills exchange. It was agreed to try and conclude the negotiations in 12 to 18 months. Minister Ciobo said there is a very strong sense of goodwill and a high degree of focus and priority given to these negotiations on both sides.

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NEW ZEALAND

[37]. TAXING INBOUND INVESTMENT AND BEPS: NZ TO MAKE DECISIONS ON HYBRIDS AND INTEREST LIMITATION

At a recent IFA Conference, NZ Minister for Revenue Michael Woodhouse said that, concerning BEPS, New Zealand was starting from a better place than most countries because it has reasonably robust rules which limit the scope for BEPS.

A key focus is how New Zealand taxes inbound investment, he said.

The Minister said there is a concern that the current treatment has the effect of raising the cost of capital. He said tax policy officials at IRD and Treasury will be engaging on this issue with officials from MBIE, MFAT and the wider Treasury.

This will be followed with a dialogue with the tax community on the tax settings for inbound investment and officials will consider the impact of tax settings for the cost of capital.

But the issue of how New Zealand should best tax inbound investment is a much broader issue than the cost of capital, Mr Woodhouse said. He expects that the dialogue between the IFA and officials should take place in the first half of the year. Those discussions, he said, will help inform decisions about what tax changes to make in 2 areas: hybrids and interest limitation.

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[38]. NEW ZEALAND NEGOTIATING TIEAS WITH 10 JURISDICTIONS

According to an update recently published by New Zealand Inland Revenue, negotiations are underway for tax information exchange agreements (TIEAs) with 10 jurisdictions, including Antigua and Barbuda, Aruba, Grenada, Macao, Monaco, Montserrat, Nauru, St Lucia, San Marino, and Seychelles. Any resulting agreements would be the first of their kind between New Zealand and the respective jurisdictions, and must be ratified before entering into force.

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INTERNATIONAL TRADE

[39]. FRANKFURT AND LONDON SEAL US$30 BILLION TRADING TIE-UP TO COUNTER US THREAT

Deutsche Boerse AG and London Stock Exchange Group Plc have agreed to combine in a US$30 billion deal to create a European trading powerhouse better able to compete with US rivals encroaching on their turf, Reuters has reported.

But the deal, which marks a third attempt to link the Frankfurt and London exchanges, may prompt a takeover war after New York Stock Exchange owner Intercontinental Exchange said it may bid for the British group.

Nearly 16 years after Deutsche Boerse first tried to take over LSE, the exchanges said last month they were discussing an all-share merger, which they confirmed on 16 March 2016 would give Deutsche Boerse shareholders 54.4% and LSE investors 45.6% of a new company.

This offers a unique opportunity for Frankfurt which has always played second fiddle to London as a global financial centre, something recognised by the German government which said it would welcome the deal if it strengthened Frankfurt.

If it goes ahead, the combination would create the world's biggest exchange by revenue, forecast at €4.7 billion this year from stock, bond and derivatives trading, indices, market data, and clearing and settlement.

Reuters said the exchanges sought to sell the deal to investors with the lure of annual cost savings of €450 million.

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THOMSON REUTERS NEWS

[40]. THOMSON REUTERS RELEASES FREE SPECIAL REPORT ON EC'S ANTI-TAX AVOIDANCE PACKAGE

As reported at 2016 ATB 4 [46], on 28 January 2016, the European Commission (EC) presented its Communication on the Anti-Tax Avoidance Package. The goal of the Package is to prevent aggressive tax planning, increase tax transparency and create a level playing field for businesses in the EU. Tax evasion results in the loss of €50 to €70 billion each year in the EU. The ATA Package offers measures to prevent companies from transferring profits to tax havens and taking advantage of differences in national legislation to reduce taxes. The measures will also strengthen rules against the misuse of bilateral tax agreements.

The 2 legislative proposals adopted were:

- an Anti Tax Avoidance Directive with legally-binding measures to tackle some of the most prevalent tax avoidance schemes. Its Recommendation on Tax Treaties advises Member States on the best ways to protect their tax treaties against abuse, in a way that is compatible with EU-law;

- a revision of the Administrative Cooperation Directive that seeks to boost transparency on the taxes that companies are paying. Under the proposed rules, national authorities will exchange tax-related information on multinational companies' activities, on a country-by-country basis. As such, all Member States will have crucial information to identify risks of tax avoidance and to better target their tax audits.

"The measures outlined in the ATA Package give the EU member states a single and coordinated approach to address tax avoidance," said Jessica Silbering-Meyer, Managing Editor, International Tax with a focus on BEPS, within the Tax & Accounting business of Thomson Reuters. "This report provides helpful guidance to keep businesses up-to-date on the latest developments for tax planning purposes."

The free Special Report is available for download from the Thomson Reuters website.

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RECENT TAX ARTICLES

[41]. RECENT TAX ARTICLES OF INTEREST

[*Citing tax and related articles from various journals of interest to practitioners, advisers and corporate tax departments; a useful research and reference tool*]

IS Chartered Accountant [Institute of Singapore Chartered Accountants] – March 2016

"SMEs seek greater regional financing capabilities to facilitate expansion"

"IFRS 16: leases" – by Lim Ju May

"Crafting the art of Goodwill in China" – by Chong Lub Bun

"Trigger points: Be alert, be ready" – Tax implications of key business milestones – by Joanna Wong and Felix Wong

"Don's column: Goodwill accounting" – by Ng Eng Juan

Hong Kong Lawyer [Law Society of Hong Kong] – March 2016

"Senior housing in China: Older and wiser" – Including foreign investment – by Janice Yau Garton

[NOTE: From time to time, the *Asia Tax and Trade Bulletin* [formerly the ASEAN Tax Bulletin] will contain cross-references to different Issues of the Bulletin. They will appear as, for example, 2016 ATB 1 [12] – this means Issue 1 para [12] of the 2016 *Asia Tax and Trade Bulletin*.]

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