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No PE for supervisory services under India Germany DTAA absent in-dependent site operation.

Domestic

No disallowance under section 14A/Rule 8D for income from investment in shares of Subsidiaries & Joint Ventures, if no expenditure is incurred

Transfer Pricing

Sale to a group entity cannot be regarded as transaction with self - Lift-ing of corporate veil held to be invalid.

Recent Notification

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16 IMPORTANT DATES TO REMEMBER

Saskia Bonenberger
Executive Director
WTS India

Dear Reader,

Taxation of Permanent Establishments in India are challenging and red tape prone, so the opinion of a lot of foreign companies´ tax departments. Indeed, it seems sometimes unpredictable, how the tax authorities generate new sources of income and force the tax payer to go to court. But this is not only applicable to India. In a lot of countries, except Brazil, to regard a company´s presence as PE is becoming more and more attractive for the governments around the globe, together with Transfer Pricing Documentation it is a demanding responsibility to have an overview how to manage PE and Transfer Pricing, especially for Machine and Plant and Construction business.

In this edition we will present you two remarkable judgements on PE, one concerning supervisory services and one on how to attribute 50 % profits on a PE, which is constituted by the Indian subsidy of a foreign telecom company. In this edition you will further find a judgement on Transfer Pricing too.

On transfer of assets of Liaison Office, Branch Office, Project Office of a foreign entity either to its wholly owned subsidiary or joint venture the powers are delegated to AD Banks, so the FEMA guidelines. More detailed you will find an article in this edition too.

The ministry of Corporate Affairs has issued a draft notification for proposed exemptions to private companies. It is a section-wise list, which is worth going through, as there is a lot of relief on different section of the law. But some more recent circulars of the ministry of Corporate Affairs are also briefly described in this journal concerning

- Deposit Insurance Contract,
- Appointment of Company Secretary,
- Matters relating to appointment of Independent Directors,
- Constitution of Audit Committee and Nomi nation and Remuneration Committee,
- Voting through electronic means,
- Corporate Social Responsibility Provisions,
- Amendement in Companies (Share Capital and Debentures) Rules 2014
- Format of Annual Return
- Incorporation of Indian Subsidiary
- Holding of shares in fiduciary capacity
- Requirement of Resident director
- Extension in filing of Form DTP-4
- Private placement of non convertible debentures

I come to the conclusion that maybe Permanent Establishments and Transfer Pricing are demanding on the tax side, but on the Corporate Law side with the new Companies Act 2013 a lot of new issues are arising, that domestic and international companies have to take care of and that are very important to comply with.

I. No PE for supervisory services under India - Germany DTAA absent independent site operation | *Author: Sapna Gupta, New Delhi*

In a recent decision, Income Tax Appellate Tribunal, Hyderabad, ("the ITAT") in the case of GFA Anlagenbau GmbH, v DDIT has held that Supervisory services rendered by an assessee through deputation of foreign technicians in India, do not constitute Permanent Establishment ("PE") in India and are taxable as 'Fees for Technical Services' ("FTS") under the provisions of DTAA between India and Germany ("the DTAA"). It has been held that merely undertaking supervisory activities does not trigger specific PE clause as per Article 5(2)(i) of the DTAA as supervisory activities have to be provided in connection with building, construction or assembly project of the assessee under such clause.

Further, mere provision of accommodation, temporary office facilities is also not to be considered as 'fixed place of business' in India as per Article 5(1) of the DTAA.

M/s. GFA Anlagenbau GmbH, ("the assessee") entered into agreements with various Indian companies for supervision, erection, ramp up, commissioning, demonstration of performance, performance guarantee test, etc. of various 'plant and machinery'. Its role was limited to such services only as the plant was supplied by another German company. The assessee had deputed foreign technicians at the work sites and offered its receipts for such services as FTS under the DTAA for many years.

The assessing Officer ("AO") held that as under some contracts supervisory activity exceeded 6 months, the assessee had a PE in India, in relation to all the contracts as per Article 5(1) & 5(2)(i) of the DTAA and accordingly the amounts under all the contracts were taxable as 'Business Profits'. Profits were attributed at 50% of the gross Receipts.

In appeal, the ITAT proceeded to decide whether the supervisory services are in the nature of FTS taxable under S. 9(1)(vii) / Article 12 of the DTAA or whether the services constitute a PE in India and as such taxable under section 9(1)(i) / Article 7 read with Article 5 of the DTAA.

The ITAT noted that the assessee had in earlier years as well offered income as FTS in respect of services rendered to various parties in India, which was all along accepted by the tax authorities.

Relying upon the decision of the High Court of Andhra Pradesh in Clouth Gummiwerke Akrineqesellschaft vs. CIT [238 ITR 861], the ITAT held that supervisory activities were to be considered under the ambit of S.9(1)(vii) i.e. Fees for Technical Services.

The ITAT, placing reliance on the decision of the High Court of Andhra Pradesh in CIT vs. Vishakapatnam Port Trust (1983) 144 ITR 146 (AP), held that the services provided are not covered by the definition of PE under provisions of Sec.92F(iiia) of the Income-tax Act which refers to a fixed place of business through which the business of the enterprises is wholly or partly carried on.

The ITAT further held that as per Article 5(1) of the DTAA also, the services are not to be considered as PE as it defines "permanent establishment" to mean a fixed place of business through which the business of an enterprises is wholly or partly carried on. The ITAT applying the ratio of the Delhi Tribunal (Special bench) decision in Motorola Inc. vs. DCIT 995 ITD 269 (Del) (SB)] held that "the assessee was clearly doing the supervision of project of the Indian company and has no fixed place of business. Only its technicians deputed to India in one project stayed in India for more than 180 days. Nothing was brought on record that the technicians are operating from a fixed place in the custody of assessee. As per the terms the stay and transportation are undertaken by Indian company, thus it cannot be said that the assessee has a fixed place of business for its supervisory activities".

Further, the ITAT noted the specific PE clause as per Article 5(2)(i) which provides that PE includes a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities continue for a period exceeding six months. The ITAT thus held that supervisory activities by themselves cannot constitute a PE as they are to be in connection with a building, construction or assembly activity of the non-resident which is not the case here as the assessee provides only supervisory activities. Accordingly, it was concluded that Article 5(2)(i), though it talks about supervisory activities, does not cover activities of the assessee Support in this regard was taken from Klaus Vogel book (Third Edition).

The ITAT noted that to apply Article 12(5) (related to FTS), to bring to charge such receipts as Business Profits, the tax payer should have a PE through which the activities were carried out, which was not so in the assessee's case and thus Article 12(5) also was inapplicable.

The ITAT further noted that it was incorrect to aggregate all contracts of the foreign company in India and consider it as one. Unless the contracts are linked with each other, contracts should be individually assessed with respect to the duration test as held in the decision of Mumbai Tribunal in the case of Valentine Maritime (Mauritius) Ltd, ITA No. 1532/Mum/05 dated 5th April 2010.

Thus, the ITAT concluded that the assessee's supervisory activities do not constitute a PE in India under the provisions of the Indian Income Tax Act as well as Article 5 of the DTAA and the same are liable to tax as 'Fees for Technical Services' under Article 12 of the Indio-German DTAA and allowed the assessee's appeal.

Contact: cs.mathur@wts.co.in

II. Indian Subsidiary of a foreign telecom company constitutes a PE to which 50% profits are attributed | *Author: Sapna Gupta, New Delhi*

Recently, Income tax Appellate Tribunal, Delhi Bench ("the ITAT") in the case of Nortel Networks India International Inc. v DDIT – ITA No 1119,1120& 1121/DEL/2010 has held that since the hardware supplied by Nortel Networks India International Inc ("the assessee") is installed by an Indian subsidiary and the contracts were pre-negotiated by the Indian subsidiary, it constituted a fixed place of business and dependent agent permanent establishment ("PE") in India under India – USA tax treaty and attribution of 50% was made under Rule 10 of the Income Tax Rules.

The assessee was a company incorporated in USA and was a group company of Nortel group which was a leading supplier of hardware and software products for GSM cellular radio telephone systems.

Nortel Networks India Private Limited ('NNIPL'), the Indian subsidiary of the assessee, entered into a contract with Reliance Infocom for supply, installation, testing, commissioning of hardware equipment. Immediately after signing the contract, NNIPL assigned the supply part of the contract to the assessee, a US company, without any consideration.

The assessee purchased the equipment from its group company, Nortel Canada, and supplied them to Reliance Infocom. Nortel Canada was not engaged in providing any services and undertook liaison activities in India. Liaison Office was extending all kind of services to group companies including the assessee. It also negotiated sales transactions.

The Assessing Officer ("AO") found that the assessee did not have any manufacturing or trading infrastructure or financial or technological capability of its own and that it was only a paper company incorporated for the sole purpose of evading taxes in India. The AO held that the Indian company and liaison office of Nortel Canada constituted a fixed place PE of the assessee. The AO further held NNIPL was a sales outlet, an installation PE, supervision PE, dependent agent PE as its employees were in India for more than 30 days. The AO assessed its income under Rule 10 on global profits of the group by adopting gross profit margin as 42.6% and allowed 5% of the turnover as deduction pertaining to selling, general and marketing expenses.

The Commissioner (Appeals) upheld the position adopted by the AO in principle but held that only 50% of such profits had to be considered to be attributable to the PE.

On appeal, the ITAT held that the contract entered between the assessee and Reliance Infocom is a turnkey, indivisible contract for supply, installation, testing, commissioning etc. NNIPL has undertaken the responsibility for negotiating and securing the contracts. The contract for installation and commissioning was also undertaken by NNIPL. These arrangements show that assessee is getting its work executed through NNIPL. The assessee is merely a shadow company of Nortel group and for all practical purposes, all the facilities and services available to the Nortel group of companies are equally available to the assessee. Since, the hardware supplied through it was installed by NNIPL and the contracts were pre-negotiated by NNIPL, it constituted a fixed place of the business and dependent agent PE of the assessee.

The Liaison Office ("LO") of Nortel Canada was rendering all kinds of services to all the group companies including the assessee, which constitutes a fixed place PE in India.

Employees of group companies visited India in connection with the project in India, which indicates that employees of group companies were carrying out business of the assessee through the premises of LO/ subsidiary.

It was held that, on facts, the contractual obligation included various activities which were carried out in Indian territory, whose compensation/ remuneration was included in the consideration and which represented the payment of the nature of works contract as entire installation and customisation has been carried out in India.

The profit and loss account of the assessee was unaudited and certified by the tax manager which reflects losses from the transaction. Therefore, the Tribunal held that Commissioner (Appeals) was right in attributing 50% of the gross profits computed in the global accounts of the assessee after allowing deduction for selling, general, marketing and R&D expenses, particularly noticing that the supply was part of the turnkey project.

Contact: cs.mathur@wts.co.in

I. No disallowance under section 14A/Rule 8D for income from investment in shares of Subsidiaries & Joint Ventures, if no expenditure is incurred | *Author: Ritu Gyamlani, New Delhi*

In a decision in the case of JM Financial Limited Vs Addl. CIT (ITA no. 4521/Mum/2012), the Income Tax Appellate Tribunal, Mumbai Bench ("the ITAT") has held that disallowance under section 14A read with Rule 8D of the Income Tax Act, 1961 ("the Act") is not warranted in cases where investments have been made in subsidiaries and Joint Ventures ("JVs") in respect of which no expenditure was incurred for either maintaining the said investments or earning the exempt income out of such investments.

JM Financial Ltd. ("the Assessee") made 97.82% of its aggregate investments in unlisted subsidiaries and JVs as a long term investment. During Assessment Year 2009-10, the Assessee earned dividend income of Rs 14,14,000/- which was claimed as exempt under section 10(34) of the Act. Expenses amounting to Rs 1,40,000/- were also disallowed under section 14A by the Assessee.

During the course of assessment proceedings, the Assessing Officer ("the AO") did not accept the disallowance made by the Assessee and proceeded to make the disallowance of Rs 7,61,37,727/- under section 14A by applying Rule 8D of Income Tax rules. The said additions were confirmed by the Commissioner (Appeals), disregarding the submissions of the Assessee that Rule 8D cannot be applied by the AO without recording the satisfaction that claim of the Assessee was not proper. The assessee also submitted that the investment made in subsidiaries was strategic and long term in nature. Accordingly, no expense was required to be incurred for maintaining the portfolio.

On appeal before the ITAT, the ITAT Observed that the department has not disputed the fact that out of the total investment, about 98% of the investment are in subsidiary companies of the assessee and, therefore, the purpose of investment is not for earning dividend income but having control and business purpose and consideration. Therefore, it observed that prima facie the assessee has made out a case to show that no expenditure has been incurred for maintaining these long term investment in subsidiary companies, against which no contrary fact or material is available.

Relying on the decision of High Court of Bombay in case of Godrej & Boyce Mfg. Co. (328 ITR 81) and Tribunal decisions in the case of Garware Wall Ropes Limited vs Addl CIT dated 15/01/2014 (ITA No. 5408/Mum/2012) and CIT vs. Oriental Structural Engineers Pvt. Ltd. (216 taxman 92.), where similar views were held on similar facts, held that section 14A(2) does not ipso facto empower the AO to apply the method prescribed by Rule 8D straightaway, without determining whether the claim of the assessee is correct or not. Therefore, when no expenditure has been incurred for maintaining the investments in subsidiary companies, the disallowance made by the AO is not justified. The disallowance was thus deleted by the ITAT.

Contact: cs.mathur@wts.co.in

I. Sale to a group entity cannot be regarded as transaction with self - Lifting of corporate veil held to be invalid | *Author: Shweta Kapoor, New Delhi*

In a recent decision in the case of ACIT Vs. Keihin Panalfa Ltd.(ITA Nos. 3278/Del/2011 & 5546/Del/2012), the Income Tax Appellate Tribunal, Delhi Bench ("the ITAT") has disregarded arbitrary lifting of corporate veil, based upon which the Transfer Pricing Officer ("TPO") held the arm's length price ("ALP") of payment of Royalty to non-resident associated enterprise as Nil.

Keihin Panalfa Ltd. ("the assessee"), an Indian company, was engaged in manufacturing and supply of automobile components, whose 74% equity was owned by Keihin Corporation, Japan ("Keihin Japan"). Honda Motor Corporation Japan ("Honda Japan") held 41.33% shares in Keihin Japan.

The assessee had entered into a 'Technology Collaboration' agreement with Keihin Japan, for licensing the assessee to manufacture products using latter's technology, know-how and technical assistance.

During the period under consideration, the assessee sold automobile components to single customer i.e. Honda Siel Cars India Limited ("Honda India"), a wholly owned subsidiary of Honda Japan.

The international transactions entered into by the assessee with its associated enterprises ("AEs") included payment of royalty, imports, etc. To determine the ALP of the said transactions, the assessee adopted Transactional Net Margin Method ("TNMM"), applying Operating Profit over Capital Employed ("OP/CE") as the Profit Level Indicator ("PLI").

The TPO observed that the assessee was functioning like a contract manufacturer making all the sales to Honda India, which was its Indian AE (indirectly through the shareholding of Honda Japan in Keihin Japan). The TPO thus held that since all sales were made to the AE, the assessee was not required to pay any royalty for the licensing of technology by Keihin Japan. The TPO further held the sale made to Honda India by the assessee as transaction with self. Accordingly, the TPO held the ALP for such transaction as Nil

The TPO also did not accept OP/CE as the appropriate PLI, as used by the assessee to justify the ALP of royalty and other international transactions. The TPO applied Operating Profit over Total Cost ("OP/TC") as the PLI and adjustment of shortfall, owing to difference in the margin of the assessee vis-a-vis the margin of comparable companies, was made to the income of the assessee, not restricting the same to the value of international transactions. The TPO further held that the benefit of +/- 5% , in terms of proviso to section 92C, is not available to the assessee.

On appeal by the assessee, the Commissioner of Income Tax (Appeals) ["CIT(A)"] deleted the entire TP adjustment. Subsequently, the revenue filed an appeal before the ITAT.

Before the ITAT, the Revenue attempted to lift the corporate veil to justify that the ultimate beneficiary of the transaction is Honda Japan and as such, the payment of Royalty by the assessee is not justified.

The assessee in response contended that it was not a captive subsidiary of Honda Japan, since the latter only had a minority stake in Keihin Japan (majority shareholder of the assessee), and all the companies are legally distinct and independent entities. Further, there was no unanimity of ownership between the assessee and Honda India. It was thus submitted that, in case of global enterprises and structures, the interconnection between the group entities cannot be the basis of lifting the corporate veil by the TPO and if the sales to Honda India are regarded as sales to self, the whole mechanism of TP provisions would fail.

The ITAT, accepting the contention of the assessee, held that in the absence of any material on record to suggest any colorable device or collusive transaction, the action of lifting the corporate veil cannot be accepted.

The ITAT further held that the TPO cannot challenge the business wisdom of payment of royalty but can only determine its ALP. Thus, the ALP of royalty payments cannot be considered as NIL.

As regards the addition made on account of change in PLI, the ITAT held that the same has to be restricted to the value of international transactions, which in the present case falls under safe harbour of +/- 5%.

The ITAT also concurred with the view of the CIT(A) that, when the TPO has accepted the full- fledged auto component manufacturers as comparable, as submitted by the assessee, the discussion whether the assessee is a licence manufacturer or contract manufacturer is irrelevant.

Contact: cs.mathur@wts.co.in

I. New Form for filing of Return of net wealth notified | *Author: Jatinder Singh, New Delhi*

The Central Board of Direct Taxes ("CBDT"), vide Notification No. 32 dated 23rd June, 2014, has notified new Form BB for filing of Return of Net Wealth, which would be effective for the Assessment Year 2014-15 and any other subsequent assessment year.

The Return of net wealth for Assessment Year 2014-15 and any other subsequent assessment year shall be furnished electronically under digital signature, except in the case of Individuals or Hindu Undivided Families to whom the provisions of the Section 44AB are not applicable (in which case it may be furnished in paper form).

Further, the return of net wealth required to be furnished in Form BB shall not be accompanied by a statement showing the computation of the tax payable, or proof of the tax and interest paid, or any document or copy of any account or form of report of valuation by registered valuer.

Contact: cs.mathur@wts.co.in

TAX Indirect Taxes
Central Excise
Recent Notification

I. Interest on belated refund is automatic under Section 11BB of the Central Excise Act, 1944 | *Author: Shashank Goel, New Delhi*

In the case of M/s Shree Balaji Aromatics Private Limited And Another Versus Union of India And Others, Allahabad High Court held that the assessee is entitled to interest u/s 11BB of the Central Excise Act, 1944 on the refunded amount, if the amount has been refunded after three months from the date of receipt of the application for refund.

In the present case, petitioner has filed refund claims in the year 2005, 2006 and 2007. Petitioner on the verbal undertaking given by the Department for expeditious disposal of refund claims, wrote a letter to the Department informing that they will not claim any interest on belated refund and certain refund claims of petitioner were allowed without interest.

By means of present writ petition, the petitioner relying upon the Circular No. 670/61/2002-CX, dated October 1, 2002 and decision of the Apex Court in the case of Ranbaxy Laboratories Ltd. Vs. Union of India [(2011) 33 STT 326] submits that interest under Section 11BB of Central Excise Act, 1944 being statutory and automatic, is payable if refund is not made within three from the date of receipt of the application for refund.

The Hon'ble High Court held that the use of words "there shall be paid to the applicant" in Section 11BB of the Excise Act, lays down that payment of interest on belated refund is automatic and not dependent upon claim by assessee. The payment of interest is not discretionary, but statutory.

[Source: M/s Shree Balaji Aromatics Private Limited And Another Versus Union of India And Others, 2014(4) TMI 1014 - ALLAHABAD HIGH COURT]

Contact: cs.mathur@wts.co.in

I. Liberalised Remittance Scheme for Resident Individuals | *Author: Shamik Sama, New Delhi*

As per the erstwhile provisions of the Foreign Exchange Management Act, 1999 ('FEMA'), remittances under Liberalised Remittance Scheme ('LRS') by resident Individuals were allowed by Authorised Dealers ('AD Banks') freely up to USD 75,000 per financial year (April-March) for any permitted current or capital account transactions or a combination of both.

The existing limit of 75,000 USD per financial year has been enhanced to 125,000 USD per financial year with effect from June 03, 2014 and AD Banks are freely allowed to effect remittance up to USD 75,000 per financial year, under the LRS, for any permitted current or capital account transaction or a combination of both.

It maybe noted that that LRS should not be used for making remittances for any prohibited or illegal transaction. Further, the other terms and conditions as applied earlier will continue to be applicable.

[Source: A.P. (DIR Series) Circular No. 138 dated June 03, 2014]

Contact: cs.mathur@wts.co.in

II. Transfer of assets of Liaison Office ('LO')/Branch Office ('BO')/Project Office ('PO') of a foreign entity either to its Wholly Owned Subsidiary('WOS')/Joint Venture ('JV')/Others in India - Delegation of powers to AD Banks | *Author: Shamik Sama, New Delhi*

As per the extant FEMA guidelines, powers related to closure of the accounts of LO/BO and repatriation of the surplus balances, subject to submission of certain closure documents are delegated to AD Banks. Further, transfer of assets of LO/BO to subsidiaries or other LO/BO or any other entity is permitted only with the prior approval of Reserve Bank of India ('RBI').

However, RBI has now decided during the process of closure of LO/BO/PO to delegate powers relating to transfer of assets of LO/BO/PO to AD Banks, subject to compliance with the following conditions:

• Such proposals will be considered only from LO/BOs who are adhering to the operational guidelines stipulated in the AP DIR Circular No. 23 & 24 of December 30, 2009 such as (i) submission of AACs (up to the current financial year) at regular annual intervals with copies endorsed to DGIT (International Taxation) and (ii) obtained PAN from IT Authorities and have got registered with ROC under Companies Act, 1956. Similarly, proposals from POs should confirm to the guidelines issued in AP DIR Cir. No.44 dated May 17, 2005 with regard to initial reporting requirements and submission of CA certified annual report indicating project status.

• A certificate is to be submitted from the Statutory Auditor furnishing details of assets to be transferred indicating their date of acquisition, original price, depreciation till date, present book value or WDV value and sale consideration to be obtained. Statutory Auditor should also confirm that the assets were not re-valued after their initial acquisition. The sale consideration should not be more than the book value in each case.

• he assets should not have been acquired by the LO/BO/PO from inward remittances and no intangible assets such as good will, pre-operative expenses should be included. AD Bank should scrutinise and ensure that no revenue expenses such as lease hold improvements incurred by LO/BOs are capitalised and transferred to JV/WOS.

• AD Bank to ensure payment of all applicable taxes while permitting transfer of assets

• Transfer of assets to be allowed by AD Banks only when the foreign entity intends to close their LO/BO/PO operations in India. Subsequently, the AD Banks should ensure closure of LO/BO in accordance with the stipulations indicated in para.5 (iii) of A.P (DIR Series) Circular No. 24 of December 30, 2009 and para.5 of A.P. (DIR Series) Circular No. 37 of November 15, 2003 in respect of POs.

• Credits to the bank accounts of LO/BO/PO on account of such transfer of assets will be treated as permissible credits.

• The relevant documents are to be preserved separately for scrutiny by their own auditors and RBI auditors.

[Source: A.P. (DIR Series) Circular No. 142 dated June 12, 2014]

Contact: cs.mathur@wts.co.in

III. Annual Return on Foreign Liabilities and Assets ('FLA') Reporting by Indian Companies ('ICs') - Revised Format | *Author: Shamik Sama, New Delhi*

As per the existing RBI guidelines, it has been stipulated that the annual return on FLA is required to be submitted in the soft form to the RBI by July 15 every year, directly by all the ICs which have received FDI and/or made FDI abroad in the previous year(s), including the current year.

In order to collect information on ICs Outward Foreign Affiliated Trade Statistics (FATS) as per the multi-agency global 'Manual on Statistics of International Trade in Services', the FLA return has been modified marginally and is made available on the RBI website, along with the related FAQs.

[Source: A.P. (DIR Series) Circular No. 145 dated June 18, 2014]

Contact: cs.mathur@wts.co.in

IV. Export and Import of Currency: Enhanced facilities for residents and non-residents | *Author: Shamik Sama, New Delhi*

As per the existing RBI guidelines, person resident in India are allowed to take outside India or having gone out of India on a temporary visit, are allowed to bring into India (other than to and from Nepal and Bhutan) currency notes of Government of India ('GoI') and RBI notes up to an amount not exceeding Rs. 10,000 (Rupees Ten Thousand).

However, on a review RBI has now decided to enhance the said prescribed limit and allowing all residents and non-residents (except citizens of Pakistan and Bangladesh and also other travellers coming from and going to Pakistan and Bangladesh) to take out Indian currency notes up to Rs. 25,000 while leaving the country.

Hence, any person resident in India:

- may take outside India (other than to Nepal and Bhutan) currency notes of GoI and RBI notes up to an amount not exceeding Rs. 25,000 (Rupees Twenty Five Thousand only); and
- who had gone out of India on a temporary visit, can bring into India at the time of his return from any place outside India (Other than from Nepal and Bhutan), currency notes of GoI and RBI notes up to an amount not exceeding Rs. 25,000 (Rupees Twenty Five Thousand Only)

Also, person resident outside India, not being a citizen of Pakistan and Bangladesh and also not a traveler coming from and going to Pakistan and Bangladesh, and visiting India:

- may take outside India currency notes of GoI and RBI notes up to an amount not exceeding Rs. 25,000 (Rupees Twenty Five Thousand only) while exiting only through an airport
- may bring into India currency notes of GoI and RBI notes up to an amount not exceeding Rs. 25,000 (Rupees Twenty Five Thousand only) while entering only through an airport

[Source: A.P. (DIR Series) Circular No. 146 dated June 19, 2014]

Contact: cs.mathur@wts.co.in

V. Remittances to non-residents - Deduction of Tax at Source| *Author: Shamik Sama, New Delhi*

The Central Board of Direct Taxes (CBDT) has revised the existing instructions being followed while allowing remittances to the non-residents, w.e.f. October 01, 2013. It has subsequently issued Income tax (14th Amendment) Rules, 2013 vide Notification No. S.O 2659(E) dated September 2, 2013 on furnishing of information under Section 195(6) of the Income Tax Act, 1961 and prescribed the rules and forms to this effect.

RBI has reviewed the policy relating to issue of instructions under FEMA, 1999, clarifying tax issues.. It has now been decided that that RBI will not issue any instructions under the FEMA in this regard. It shall be mandatory on the part of AD Banks to comply with the requirement of the tax laws, as applicable.

[Source: A.P. (DIR Series) Circular No. 151 dated June 30, 2014]

Contact: cs.mathur@wts.co.in

I. Switching over from NIC-1987 to NIC-2008 | *Author: Shamik Sama, New Delhi*

It has been decided by Department of Industrial Policy & Promotion ('DIPP'), Ministry of Commerce & Industry ('MoC&I'), GoI to switch over from NIC-1987 to NIC-2008.

Therefore, NIC-2008 would be followed in place of NIC-1987 for classification activities, w.e.f. June 27, 2014.

Henceforth, NIC-2008 would be followed in place of NIC-1987, for classification of activities for approvals, registrations and categorization. This is an important change which may be noted for compliance, w.e.f. June 27, 2014.

[Source: Press Note No. 4 (2014 Series), DIPP, MoC&I, GoI dated June 27, 2014]

Contact: cs.mathur@wts.co.in

I. Proposed exemptions to private companies based on draft notification issued by MCA on 24th June, 2014 | *Author: Rakhi Chanana, New Delhi*

In terms of Section 462 (1) of the Companies Act, 2013, the Ministry of Corporate Affairs(MCA) has issued a draft notification dated 27th June, 2014 in respect of exemptions, exceptions, modifications or adaptations from relevant provisions of the Act for private companies. The said draft notification was available on MCA's website for public comments till 1st July, 2014.

A section-wise list of proposed exemptions to private companies in terms of the said draft notification is given hereunder:

S. No.	Section Number/ Sub-section of Companies Act, 2013	Subject matter	Exceptions/ modifications proposed
1.	Section 43 and Section 47	Kinds of share capital and voting rights.	Shall not apply to private companies.
2.	Section 62 (1)(a) and Section 62 (2)	Further issue of shares to existing shareholders of the company in proportion to the paid up capital on those shares by sending a a letter of offer to be kept open for not being less than 15 days and not exceeding 30 days.	Shall apply with the following modification - Words 'not being less than 15 days and not exceeding 30 days' shall be substituted with 'not being less than 7 days and not exceeding 15 days'.
3.	Section 62(1) (b)	Issue of shares to employees under a scheme of employee's stock option subject to special resolution passed by the company.	Shall apply except that instead of special resolution, ordinary resolution would be required for private company.

4.	Section 73 (2)	Acceptance of deposits from members subject to fulfillment of various conditions- issuance of circular to its members, filing a copy of the circular with ROC, depositing 15% of the amount of its deposits maturing during a financial year and the financial year next following , providing deposit insurance etc.	Shall not apply to private companies having 50 or less number of members if they accept monies from their members not exceeding 25% of aggregate of the paid up capital and free reserves or 100 % of the paid up capital, whichever is more, and which inform the details of such monies to the ROC in the prescribed manner.
5.	Section 101 to 107 and Section 109	Notice of general meeting, quorum of general meetings, chairman of meetings, proxies, voting by show of hand and demand for poll	Shall apply unless: - otherwise specified in respective sections or - unless articles of private company otherwise provide.
6.	Section 141 (3) (g)	An auditor not to hold appointment as auditor of more than twenty companies.	Shall not apply in respect of appointment of auditors by private companies.
7.	Section 160	Right of persons other than retiring directors to stand for directorship -requirement of not less than 14 days notice along with a deposit of Rs. 1 lakh.	Shall not apply to private companies
8.	Section 162	Appointment of directors to be voted individually	Shall not apply to private companies.
9.	Section 180	Restrictions on powers of Board and requirement of obtaining shareholders approval by special resolution for certain matters such as -	Shall not apply to private companies having 50 or less number of members
		- to sell, lease or dispose of of whole or substantially the whole of an undertaking of the company or - to borrow in excess of paid up capital and free reserves, apart from temporary loans obtained from bankers.	
10.	Section 185	Restrictions on granting loans to Directors or entities in which Directors are interested.	Shall not apply to private companies - - which have borrowings from banks or financial institutions or any bodies corporate not more than twice of their paid up capital or Rs. 50 crores, whichever is lower and - in whose share capital no other body corporate has invested any money.
11.	Section 188	Related Party transactions requiring Board approval and in case the paid up capital of the company exceeds Rs.10 crores or certain other criteria are met, shareholders approval by way of special resolution. Further, interested directors and related shareholders not to vote on such matters.	Shall not apply to private companies.

12.	Section 196 (4) and (5)	Appointment and remuneration of MD/WTD to be approved by Board subject to approval of shareholders and by Central Government in case such appointment is at variance to conditions specified in Schedule V.	Shall not apply to private companies.
13.	Section 203 (3)	Whole-time KMP shall not hold office in more than one company except in its subsidiary company at the same time.	Shall not apply to private companies.

Note - The above provisions will be finally included in the proper notification to be issued by the Govt. In the meantime, these are brought to the notice of all concerned for information.

II. Recent Circulars and Notifications issued by Ministry of Corporate Affairs | *Author: Shikha Nagpal, New Delhi*

• Deposit Insurance Contract: The MCA has notified Companies (Acceptance of Deposits) Amendment Rules, 2014, vide notification dated June 06, 2014, for amendment of Rule 5 of Companies (Acceptance of Deposits) Rules, 2014. Rule 5(1) provides that every company accepting deposits from its members and every other eligible company inviting deposits shall enter into a deposit insurance contract at least thirty days before the issue of circular or advertisement or the date of renewal of deposits, as the case may be. Now, as per amended Rule 5, companies may accept deposits without entering into deposit insurance contract till March 31, 2015.

• Appointment of company secretary: The MCA has notified Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2014, vide notification dated June 09, 2014, for amendment of Rule 8 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014. As per Rule 8, every listed company and every other public company having a paid up share capital of ten crore rupees or more shall have whole-time key managerial personnel (KMP). Now, as per the notification, a new Rule 8A shall be inserted after Rule 8, which provides that a company other than a company covered under rule 8 and which has a paid up share capital of five crore rupees or more shall have a whole-time company secretary. Accordingly, all companies whether public or private, having paid up share capital of five crore rupees or more shall now have a whole-time company secretary, as was required under Companies Act, 1956.

• Matters relating to appointment of Independent directors: The Ministry of Corporate Affairs (MCA) has issued general circular No. 14/2014 dated June 09, 2014, through which it has clarified certain matters pertaining to appointment of Independent directors (ID). The highlights of the Circular are as under:

- As per Section 149(6)(c) of the Companies Act, 2013, an ID shall not have or had any pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year. In this regard, MCA has clarified that transaction entered into by an ID with the concerned company in the ordinary course of business and at arm's length price would not be treated as a pecuniary relationship. Further, it has been clarified that receipt of remuneration by an ID by way of sitting fees, reimbursement of expenses for participation in Board and other meetings and profit related commission approved by members, will not tantamount to pecuniary relationship.

- Regarding, whether ID(s) appointed prior to April 01, 2014, may continue or they should demit office and be re-appointed under the New Act, MCA has clarified that if the Company intends to appoint existing ID(s) under the provisions of Companies Act, 2013, such appointment shall be made under section 149(10) & (11) read with Schedule IV of the Act, within 1 year from April 01, 2014, subject to fulfillment of other conditions.

- Further, as Sec 149(10) allows holding of office by an ID for a term up to five consecutive years, so if even if an ID is appointed for a term of less than five years, such appointment is treated as one complete term under Sec 149(10). Moreover, as per Sec 149(11), no ID shall hold office for more than two consecutive terms, therefore, accordingly, even if the total number of years in two consecutive terms are less than 10 years,

such ID has to demit office and can be re-appointed only after cooling-off period of three years.

- Regarding issue of letter of appointment to ID pursuant to clause IV(4) of Schedule IV (Code for Independent Directors), MCA has clarified that in case of appointment of existing ID(s) under the new Act, such appointment needs to be formalised through a letter of appointment.

• Constitution of Audit Committee and Nomination and Remuneration Committee: MCA has notified Companies (Meetings and Powers of Board) Amendment Rules, 2014, vide notification dated June 12, 2014, for amendment of Rule 6 of Companies (Meetings of Board and its Powers) Rules, 2014. As per the amended Rule 6, public companies covered under Rule 6, which were not required to constitute Audit Committee under the corresponding Sec 292A of the Companies Act, 1956, shall constitute an Audit Committee within 1 year from the commencement of these rules i.e. 01.04.2014 or appointment of independent directors by them, whichever is earlier.

Similarly, public companies covered under Rule 6 shall constitute Nomination and Remuneration Committee within 1 year from 01.04.2014 or appointment of independent directors by them, whichever is earlier.

• Voting through Electronic means: Pursuant to Sec 108 read with Rule 20, all listed companies and public companies having 1000 or more shareholders were required to provide facility to vote through electronic means to its members at general meetings. However, MCA vide issue of general circular No. 20/2014 dated June 17, 2014, has clarified that keeping in view, the procedural requirements, engagement of depository agencies and the need for clarity on matters like demand for poll / postal ballot, the MCA has made relevant provisions mandatory with effect from January 01, 2015.

Accordingly, the MCA, by way of issue of notification dated June 23, 2014 has issued Companies (Management and Administration) Amendment Rules, 2014, for amendment of Rule 20 of Companies (Management and Administration) Rules, 2014. A Proviso has been inserted to Rule 20(1) stating that a company may provide the facility referred to in rule 20(1) on or before January 01, 2015.

Further, earlier the opening lines of Rule 20(3) states that " A company which opts to provide the electronic voting facility to its members" giving indication to voluntary application of Rule 20. Now, Rule 20(3) has been aligned with Rule 20(1) by substitution of words "which opts to provide" with the words "which provides".

• Corporate Social Responsibility provisions: Through issue of general circular No. 21/2014 dated June 18, 2014, MCA has issued clarification with respect to provisions of Corporate Social Responsibility (CSR) under Sec 135 of the Act. The highlights of the Circular are as under:

- Regarding activities covered under Schedule VII (Activities which may be included by Companies in their CSR policies), MCA has clarified that Schedule VII must be interpreted liberally, provided it retains the essence of the subject enumerated in said Schedule.

- Further, CSR activities undertaken by the companies should be in project/programme mode, rather than One-off events viz. Marathons / awards/charitable contribution / advertisement / sponsorships or TV programmes etc. which would not qualify as CSR expenditure.

- Any expenses incurred by companies for the fulfillment of any Act/ Statute of regulations (such as Labour Laws, Land acquisition Act etc.) would not count as CSR expenditure.

- Salaries paid by the companies to regular CSR staff as well as to volunteers of the companies (in proportion to company's time/hours spent specifically on CSR) can be factored into CSR project cost as part of the CSR expenditure.

- The threshold of net worth, turnover and net profits as provided in Sec 135(1) of the Act for determining the applicability of CSR provisions needs to be reckoned for any of the three preceding financial years i.e. from F/Y 2011-12 to 2013-14.

- Expenditure incurred by Foreign Holding Company for CSR activities in India will qualify as CSR spend of the Indian subsidiary if, the CSR expenditures are routed through Indian subsidiaries and if the Indian subsidiary is required to do so as per section 135 of the Act.

- With reference to Rule 4(2) of Companies (Corporate Social Responsibility Policy) Rules, 2014, which allows the companies to undertake CSR activities through Registered trust, MCA has clarified that Registered Trust would include Trusts registered under Income Tax Act 1961, for those States where registration of Trust is not mandatory.

- Companies may also contribute to the Corpus of a Trust/ society/ section 8 company etc. as CSR expenditure, provided that (a) the Trust/ society/section 8 company etc. is created exclusively for undertaking CSR activities or (b) where the corpus is created exclusively for a purpose directly relatable to a subject covered in Schedule VII of the Act.

• Amendment in Companies (Share Capital and Debentures) Rules, 2014: MCA has notified Companies (Share Capital and Debentures) Amendment Rules, 2014, vide notification dated June 18, 2014, for amendment of Rule 4, 13 and 18 of Companies (Share Capital and Debentures) Rules, 2014. A brief overview of the amend-

ments are as under:

- Regarding issue of shares with differential voting rights, Explanation to Rule 4 has been substituted with the following explanation:

"For the purposes of this rule it is hereby clarified that equity shares with differential rights issued by any company under the provisions of the Companies Act, 1956 and the rules made thereunder, shall continue to be regulated under such provisions and rules."

- In terms of Rule 13(2), the price of the shares or other securities to be issued on a preferential basis shall be determined on the basis of valuation report of a registered valuer. However, the section and rules relating to Registered Valuer has not been notified by MCA. In view of this, it has been clarified that till a registered valuer is appointed in accordance with the provisions of the Act, the valuation report shall be made by an independent merchant banker who is registered with SEBI or an independent Chartered Accountant in practice having a minimum experience of ten years.

Further, it is clarified that the price of securities to be issued on preferential basis shall not be less than the price determined on the basis of valuation report of a registered valuer.

• Format of annual return: Through issue of general circular No. 22/2014 dated June 25, 2014, MCA has issued clarification with respect to format of annual return applicable for financial year 2013-14. It has been clarified that for F/Y 2013-14 ending on March 31, 2014, annual return would be prepared in accordance with Schedule V of the Companies Act, 1956 and the new format of annual return in Form MGT-7, shall be applicable for F/Y ended on or after April 01 2014.

• Incorporation of Indian subsidiary: Through issue of general circular No. 23/2014 dated June 25, 2014, MCA has issued clarification with respect to incorporation of Indian subsidiary by a company incorporated outside India. MCA has clarified that as there is no corresponding section in the new Act to Sec 4(7) of the Companies Act, 1956, therefore, there is no bar in the new Act for a company incorporated outside India, to incorporate an Indian subsidiary either as a public or a private company, irrespective of the fact that such company incorporated outside India is incorporated in its home country either as a public or as a private company.

• Holding of shares in fiduciary capacity: Through issue of general circular No. 24/2014 dated June 25, 2014, MCA has clarified that for the purpose of determining the relationship of a company as an "associate company" (control of at least 20% of total share capital), the shares held by a company in another company in a fiduciary capacity shall not be counted.

• Requirement of Resident director: Through issue of general circular No. 25/2014 dated June 26, 2014, MCA has issued clarification with respect to applicability of requirement of resident director. As per Sec 149(3) of the Act, every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year. In this regard, it has been clarified as the requirement of having at least one resident director has arisen with effect from April 01, 2014, therefore the first "previous calendar year" for compliance of these provisions would be the remaining period of calendar year 2014 (from 01.04.2014 to 31.12.2014). Therefore, on a proportionate basis, the director needs to be resident in India in excess of 136 days during calendar year 2014. By following the above clarification, in our view, existing companies may find it difficult to meet this requirement before August 15, 2014.

Further, companies incorporated between 01.04.2014 to 30.09.2014, should have a resident director either at the incorporation stage itself or within six months of their incorporation. Any company incorporated after 30.09.2014 needs to have a resident director from the date of incorporation itself.

• Extension in filing of Form DPT-4: Through issue of general circular No. 27/2014 dated June 30, 2014, MCA has extended the time for filing of From DPT-4 under the provisions of Sec 74(1)(a) of the Act. As per the said section, in respect of deposits accepted by a company before 01.04.2014 and the amount of such deposit or part thereof or any interest due thereon remains unpaid as on 01.04.2014 or becomes due at any time thereafter, the company shall file with the Registrar in Form DPT-4, within a period of three months from 01.4.2014 i.e. until June 30, 2014 or from the date on which such payments, are due, a statement of all the deposits accepted by the company and sums remaining unpaid on such amount with the interest payable thereon along with the arrangements made for such repayment. In this regard, the MCA has granted extension of time for a period of two months i.e. now Form DPT-4 can be filed with the Registrar up till August 31, 2014 without payment of any additional fee.

• Private placement of non convertible debentures: MCA has notified Companies (Prospectus and Allotment of Securities) Amendment Rules, 2014, vide notification dated June 30, 2014, for amendment of Rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014. According to Rule 14(2)(a), a company shall not make a private placement of its securities unless the proposed offer or invitation of securities has been previously approved by shareholders of the company by a special resolution for each of the offer or invitation. According to Second proviso to Rule 14(2) in case of an offer or invitation for non-convertible debentures, it shall be sufficient if the company passes special resolution only once in a year for all the offers or invitation for such debentures during the year. A third proviso has now been inserted to Rule 14(2), vide the above notification, providing that, in case of an offer or invitation for non-convertible debentures is made within a period of six months from the date of commencement of these rules i.e. April 01, 2014, the special resolution may be passed within the said period of six months i.e. till September 30, 2014.

Contact: cs.mathur@wts.co.in

Topics	Due by
Deposit of TDS for the month July, 2014	August 7, 2014
Deposit of Service Tax for Companies for the month of July, 2014	August 5, 2014 (by e-payment – August 6, 2014)

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WTS India Private Limited
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Author
WTS India Private Limited
1-H, Vandhna
11, Tolstoy Marg
New Delhi - 110 001
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Contact at WTS | Heidi Jackelsberger | heidi.jackelsberger@wts.de

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