September 2014

wts

India journal

www.wts.in

#9.2014

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Saskia Bonenberger
Executive Director
WTS India

Dear Reader,

New WTS India Journal

In this India Journal the most important topic is the development of the BEPS. For the future it will have a big impact on our tax system. In India the most interesting topic is the constitution of the Committee for considering tax issues on indirect transfers arising out of retro amendements. The Vodafone case has left a bad reputation on India's tax administration. Finance Minister Arun Jaitly in his budget speech announced this Committee. It is the attempt not to give wrong signals by changing the law again, but to deal carefully with the upcoming cases. We will have to wait, which cases will come up as taxable in India. Unfortunately there are only public servants and tax officers in the Committee, nobody from the entrepreneur's side or institution.

Foreign Nationals in India will be relieved that the Reserve Bank of India in their "Liberalised Remittance Scheme (LRS)" for resident individuals increased the limit from USD 75,000 to USD 125,000 and allows now also acquisition of immovable property outside India.

Concerning Corporate Law the definition of Related Party and a clarification regarding Related Party transactions is important to know.

WTS in the next month has two major events. It is sponsoring the 58th Annual Meeting of the Indo German Chamber of Commerce in September Wednesday 25th and it is holding a workshop on the IFA Congress on 13th October on "Taxation of Cross Border Engineering and Plant Construction Projects with Special Focus on India". Both events will be held in Mumbai.

Yours faithfully

I. Conclusions on the first OECD deliverables regarding BEPS | *Author: Maik Heggmair, Gemany; Jan Boekel, Netherlands; Marvin Rust, Great Britain*

On 16 September 2014, the OECD launched its BEPS 2014 deliverables with a webcast. The comments, progress and current level of agreement across OECD countries, the G20 and developing world highlights the continuing political will to implement new rules world-wide. However, it is also evident that differences remain and a range of difficult issues still need to be addressed.

The envisaged implementation speed is striking. A multilateral instrument is now regarded as both feasible and desirable for implementation. Moreover, the new rules on transfer pricing are clarifications of existing legislation, and so should be valid upon adoption, subject to transition rules. The goal of the rules is clear – to create a level playing field between taxpayers regarding the (dis)ability to reduce taxes where double (non) taxation must be avoided.

The first set of seven BEPS deliverables are (the hyperlinks below are to each of the seven reports as posted separately on the OECD website):

1. **Hybrid mismatch arrangements** (Action 2) to neutralise the effect of hybrid instruments and entities and thereby provide for coherence of corporate income taxation at the international level. This is to be achieved through new domestic rules to neutralise hybrid mismatch arrangements and new model tax treaty provisions to deal with transparent entities and address the interaction with the new domestic rules.

2. **Prevent the abuse of tax treaties** (Action 6) to restore the intended benefits of inter-national standards and to prevent the abuse of tax treaties. Recommendations include that a clear statement of intention should be included in treaties; a minimum standard of anti-abuse provisions be included in treaties; and policy considerations should be reviewed prior to entering into treaties.

3. **Transfer pricing issues in the key area of intangibles** (Action 8) to support transfer pricing outcomes in line with value creation. There is further work to do in certain areas, but some new final guidance has been published.
"it is good news that for IP it is recognised that the starting point for taxation is legal ownership. Again the interim guidance does not deal with the more complex issues although there is some indication that a form of profit sharing may be appropriate in hard to value intangible transfers. One could argue that this is a restatement of the current status with CCA's and buy in payments where declining royalties is an established 'best' method." said Marvin Rust, a member of the WTS global transfer pricing team.

4. **Transfer pricing documentation and a template for country-by-country reporting** (Action 13) to improve transparency for tax administrations and aid risk assessment. There is now greater clarity on what will be required through the amendment to the Transfer Pricing Guidelines. The implementation process remains to be addressed.

"The argument for country by country reporting appears to be going the way of certain governments. The main concern here for companies is around the cost of compliance and the 'fishing trips' that fiscal authorities and other organisations may seek to pursue with greater information that may not be necessarily better information." said Maik Heggmair, Head of Transfer Pricing for WTS Germany.

5. **Challenges of the digital economy** (Action 1). It was stated that the digital economy cannot be "ring-fenced" for tax purposes. However, there are features of the digital economy that exacerbate BEPS risks. Therefore, these risks should be addressed within other elements of the BEPS action plan, including specifically the CFC work, PE issues and transfer pricing.
"It comes as no surprise that after 12 months of committee deliberations that the conclusion on the digital economy is that the taxation of it is a difficult topic. Work will not be completed on the complex issue before December 2015." said Jan Boekel, a Dutch member of the WTS global transfer pricing team.

6. **Feasibility of developing a multilateral instrument** (Action 15) for swift implementation of BEPS actions, to have the same effects as simultaneous renegotiation of bilateral tax treaties. This is now considered both feasible and desirable. A draft mandate for the negotiation of a multilateral instrument is being taken forward.

7. **Harmful tax practices** (Action 5) to revamp the work on harmful tax practices. There is particular focus on substantial activity requirements and consideration of intangibles regimes.

We consider that the OECD has made very good progress in developing rules to reduce the opportunities to artificially reduce taxes. However, still is unclear how and when the (local) legislation embedding those rules will be implemented, given that various plans re-quire a domestic change of laws, e.g. the rules to address hybrid mismatch arrangements.

"Finally, not within the scope here, is the US reaction and buy in to this proposed set of rules. With a government that is unable to agree to new tax laws and the current treatment by many international companies of all entities outside the US as one (through check the box elections) many of the questions and issues around substance and transparency look very different. A coherent set of tax principles needs the world's leading economies to be fully aligned." said Victoria Garton in London.

Upon implementation of the plans, the international tax planning landscape will change. For example, appropriate transfer pricing in line with the value creation and substance will be the norm and the subject of greater focus. Immediate consideration of the implications of the new legislation is strongly recommended. The new legislation is not expected before the end of 2015, however some countries have already acted with legislation against the hybrid instruments (e.g. France).

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II. Income received by UK company from its Indian subscriber banks for providing 'foreign exchange deal matching system' constitutes royalty | *Author: Jatinder Singh, New Delhi*

Reuters Transaction Services Limited ("assessee") is a company and tax resident of United Kingdom. It was engaged in the business of providing matching systems enabling authorized dealers such as banks etc to deal in spot foreign exchange with other foreign exchange dealers electronically. Its server was located outside India in Geneva. It entered into an agreement with its subsidiary, Reuters India Private Limited ("RIPL") for marketing its services to the subscribers in India. The assessee claimed that the revenue earned by the subscribers in India was its business profits, which in the absence of Permanent Establishment (PE) under India-UK DTAA is not taxable in India. It also claimed that the revenue earned from the subscribers in India is not in the nature of royalty or fee for technical services ("FTS") and accordingly not liable to tax under Article -13 of DTAA. The tax officer held that revenue received by the assessee is in the nature of royalty as well as FTS under the provisions of Income-tax Act as well as DTAA and even its business profits are taxable in India as RIPL constitutes both agency PE as well as fixed place PE of the assessee. Commissioner (Appeals) held the receipts as royalty and FTS, taxable on gross basis.

On further appeal, the Mumbai Tribunal held that the assessee is facilitating its clients to use its system and application programming interface which is subscriber interface for use with the related services including Auto quote service and is also providing the equipment with pre-loaded software to its subscribers and network used for provision of the services. The information is made available by the assessee through its system and other equipments installed at the site of the subscriber to facilitate the connectivity with the assessee's system/reuter located in Geneva. The platform of transacting the purchase and sale is commercial equipment allowed to be used by clients/ subscribers for commercial purposes. The nature of service rendered by the assessee includes the information concerning commercial use by the subscriber.

Further, the Tribunal also held that the entire system of the assessee including the equipments and connectivity facility is provided at the site of the subscriber. Therefore, the assessee is providing the service in the form of information and solution to the need of the subscribers by providing the matching party. The Indian subscribers have been granted a license to use the software for their internal business, which can be sub-licensed by them. The Indian clients are paying for use and right to use of equipment (scientific, commercial) along with software for which license was granted by assessee. It is not a case of simplicitor payment for access to the portal by use of normal computer and internal facility but the access is given only by use of computer system and software system provided by the assessee under license.

Therefore, the Tribunal held that by allowing the use of software and computer system to have access to the portal of the assessee for finding relevant information and matching their request for purchase and sale of foreign exchange amounts to imparting of information concerning technical, industrial, commercial or scientific equipment work and payment made in this respect constitutes royalty.

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

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I. New form for Tax Audit Report notified | *Author: Jatinder Singh, New Delhi*

The Central Board of Direct Taxes ("CBDT") has substituted Form No. 3CD (Tax Audit Report) vide Notification No. 33/2014 dated July 25, 2014. The new Form 3CD has introduced some additional reporting requirements, which may require extensive information to be collected by the auditor and examination thereof. In addition to this, the new Form has substituted some of the existing clauses, whereby additional details have been sought in the format prescribed therein.

The major information required by the new reporting clauses include:

- Details in respect of assessable value by stamp valuation authority, in respect of transfer of any land or building.
- Disallowance under Section 40A(3) in respect of payments made other than by way of an account payee cheque;
- Consideration for issue of shares exceeding fair market value, as referred in Section 56(2)(viib);
- Details of speculation loss;
- Details of loss referred to in Section 73A (in respect of specified business referred to in Section 35AD);
- Details of filing of TDS returns, interest payable under section 201(1A)/206C(7) for failure to deduct/pay TDS/TCS;
- Details of demand raised or refund issued under any tax laws other than Income-tax Act & Wealth Tax Act.

In addition to the above, the changes as made to the existing clauses include extensive details in respect of tax deducted or collected at source.

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II. Due date of filing Tax Audit Report extended | *Author: Jatinder Singh, New Delhi*

In view of the extended revision made in the Tax Audit Report, the CBDT has extended the due date for obtaining and furnishing of tax audit report under section 44AB of the Act in respect of assessment year 2014-15 from September 30, 2014 to November 30, 2014 in respect of assessees who are not required to furnish Transfer Pricing report under section 92E of the Act. The CBDT in the aforesaid order under section 119 dated August 20, 2014 has also clarified that the tax audit reports filed by the assessees up to July 24, 2014 in the pre-revised form shall be treated as valid reports.

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III. Clarification on transfer of technical manpower from an existing unit to a new SEZ unit | *Author: Jatinder Singh, New Delhi*

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

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

It has been observed that there are cases of transfer/re-deployment of technical manpower from existing units of an assessee engaged in computer software development to its new SEZ unit, which is considered by assessing officers as splitting up or reconstruction of the existing business. This results in denial of benefit under section 10AA of the Act.

The CBDT vide Circular No. 12/2014 dated July 18, 2014 has clarified that in the case of assessees engaged in the development of software or in providing IT Enabled Services in SEZ units, mere transfer or re-deployment of existing technical manpower from an existing unit to a new SEZ unit in the first year of commencement of business will not be construed as splitting up or reconstruction of an existing business, provided the number of technical manpower so transferred does not exceed 20 per cent of the total technical manpower actually engaged in developing software at any point of time in the given year in the new unit.The existing limit for deduction of interest paid of Rs. 0.15 million on self-occupied house property has been increased to Rs. 0.2 million.

The aforesaid amendments will be effective from Assessment year ("AY") 2015-16.

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IV. High Level Committee for considering tax issues on indirect transfers arising out of retro amendments constituted | *Author: Jatinder Singh, New Delhi*

The Finance Minister, in the Budget Speech 2014, made an announcement that all fresh cases arising out of the retrospective amendments of 2012 in respect of indirect transfers and coming to the notice of the Assessing Officers will be scrutinized by a High Level Committee to be constituted by the CBDT before any action is initiated in such cases.

In line with the said announcement, the CBDT vide Order dated August 28, 2014 has formed a committee for the above purpose, which shall consist of following officers of CBDT as members:

- Joint Secretary (FT & TR-I)
- Joint Secretary (TPL-I)
- Commissioner of Income Tax (ITA)

The Director (FT&TR-I) shall be the Secretary of the Committee.

The Assessing Officer ("AO"), before proceeding with any action arising out of retrospective amendment with regard to transfer before April 1, 2012 of a capital asset situate in India, shall make a reference to the committee, which in turn shall endeavour to decide the reference within 60 days of its receipt.

The AO is required to make a reference in respect of the said amendments, if no proceedings in relation to such matter are pending or notice relating thereto has been issued as on the date of issue of this order i.e. August 28, 2014.

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V. DTAA with Malta and Fiji made effective from April 1, 2015 | *Author: Jatinder Singh, New Delhi*

The Central Government, vide Notification No. 34/2014 dated August 5, 2014, has directed that the provisions of Double

Taxation Avoidance Agreement ("DTAA") between India and Malta along with the protocol thereto shall be effective from April 01, 2015.

Similarly, in respect DTAA between India and Fiji, the provisions of the said DTAA as signed on January 30, 2014 have also been made effective from the above date, vide Notification No. 35/2014 dated August 12, 2014.

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I. Budgetary changes, which were to take effect post assent to the Finance Bill, has been notified to be effective from October 1, 2014 | *Author: Shashank Goel, New Delhi*

In our email dated August 14, 2014 a note on changes made in the Union Budget 2014-15 has been circulated. In terms of above, certain changes are to take effect from October 1, 2014.

Accordingly the Government has notified the following provisions to be effective from October 1, 2014:

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a) Rate of Exchange for purposes of Service tax

As per the Explanation to Section 67A of the Finance Act, 1994 as applicable prior to the amendment brought by the Budget, the rate of exchange for the purpose of valuation of taxable services was defined as the rate of exchange referred to in Explanation to section 14 of the Customs Act, 1962.

The amendment has now substituted the said explanation as under:

"Explanation for the purpose of this section, 'rate of exchange' means the rate of exchange determined in accordance with the rules as may be prescribed".

The rate of exchange as would be applicable has been notified by the Government by inserting Rule 11 in the Service tax Rules, 1994 as under:

"11. Determination of Rate of Exchange - The rate of exchange for determination of value of taxable service shall be the applicable rate of exchange as per the generally accepted accounting principles on the date of point of taxation arises in terms of Point of taxation Rules, 2011"

It may be noted that the above amendment has been notified with effect from October 1, 2014

[Source: Notification No. 19/2014- Service Tax dated August 25, 2014]

b) Pruning of Negative List

Changes in the Negative list were notified in the corporate update dated August 14, 2014 (on Union Budget 2014-15). Such changes were to take effect from a date to be notified by the Government after enactment of the Finance Act, 2014.

The government has since notified October 1, as the date from which the above changes would be notified. For ready reference, the changes are mentioned below:

- Sale of space or time slots for advertisements other than advertisement broadcast by radio or television were part of Negative list. The amended clause (g) of section 66D seeks to exclude only 'Sale of Space for advertisement in Print Media' from the levy of service tax.

  Therefore, from effective date (yet to be notified), on - line and mobile advertisement, out-of-home media, bill boards, conveyances, buildings etc, would be subject to service tax.

- Radio Taxis have now been removed from the Negative list and will now be taxable. Further Radio Taxis shall be taxed at par with Rent-a-cab services for abatement purposes.

I. Service Tax Audit by Department under Rule 5A of Service Tax Rules, 1994 has been held as ultra-vires by Delhi High Court on August 4, 2014. | *Author: Shashank Goel, New Delhi*

In the case of Travelite (India) Vs. Union of India and Ors., it is held by the Delhi High Court that Rule 5A(2) of the Service tax Rules, 1994 is ultra-vires the provisions of the Finance Act,1994 and the instruction regarding audit by department is contrary to the Statue. In the present case, Travelite (India) (the Petitioner) received a letter from the Commissioner of Service tax dated November 7, 2012 ("the Letter") in which its records for the years

2007-08 to 2011-12 sought for scrutiny by an audit party under Rule 5A(2) of the Service Tax Rules, 1994. The Petitioner being aggrieved by the Letter filed a writ petition before the Hon'ble High Court of Delhi challenging the validity of Rule 5A(2) of the Service Tax Rules, 1994 brought into force vide Notification No. 45/2007-ST dated December 28, 2007 as well as the CBEC Instruction F. No. 137/26/2007-CX.4 dated January 1, 2008.

The contention of the petitioner in the present case was that an assessing officer can call for records under Section 72A of the Finance Act, 1994 and Section 72A envisages an audit of an assessee's records only in special circumstances, namely, when the utilization of Cenvat Credit in excessive of the limit permissible or by fraud etc and when the business operations of the assessee are dispersed across multiple locations. The Finance Act, 1994 does not contain any substantive power to call for records for scrutiny under Rule 5A(2) of the Service Tax Rules, 1994.

Therefore, Rule 5A(2) of the Service Tax Rules, 1994 is not within the rule making power conferred under Section 94 of the Finance Act and is inconsistent with Section 72A of the Finance Act, 1994. The petitioner has also challenged the Instruction issued by CBEC.

The Hon'ble Delhi High Court in the present case held that the generality of the rule making power conferred under Section 94(1) is only to the extent that rules made in exercise of that power are in conformity with the provisions of the statute. Therefore, Rule 5A(2) of the Service Tax Rules, 1994 cannot provide for a general audit of the assessee and is ultra vires the rule making power conferred under Section 94(1) of the Finance Act, 1994 and Service tax audit manual is merely an instrument of instructions for the service tax authorities and do not have any statutory force.

[Source: Travelite (India) Vs. Union of India and Ors. [2014 (8) TMI 200 - DELHI HIGH COURT]

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FOREIGN EXCHANGE MANAGEMENT ACT

I. Financial Commitment by Indian Party under Overseas Direct Investment ('ODI') – Restoration of Limit | *Author: Shamik Sama, New Delhi*

As per the erstwhile provisions of the Foreign Exchange Management Act, 1999 ('FEMA'), in force from August 14, 2013, the total ODI/Financial Commitment of an Indian Party in all its Joint Ventures ('JVs') and/or Wholly Owned Subsidiaries ('WOSs') abroad engaged in any bonafide business activity was limited to 100 per cent of the net worth of the Indian Party as on the date of the last audited balance sheet under the Automatic Route.

However, on a review the Reserve Bank of India ('RBI') has decided to restore the limit of ODI/FC of an Indian Party under the automatic route to the limit prevailing, prior to August 14, 2013, i.e. the total ODI of an Indian Party in all its JVs and/or WOSs abroad engaged in any bonafide business activity shall now be again limited to 400 per cent of the net worth of the Indian Party as on the date of the last audited balance sheet under the Automatic Route.

Provided, that any Financial Commitment exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the RBI even when the total Financial Commitment of the Indian Party is within the eligible limit under the automatic route (i.e., within 400% of the net worth as per the last audited balance sheet).

[Source: A.P. (DIR Series) Circular No. 1 dated July 03, 2014]

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II. Liberalised Remittance Scheme ('LRS') for resident individuals-Increase in the limit from USD 75,000 to USD 125,000 | *Author: Shamik Sama, New Delhi*

The RBI had vide its circular A.P. (DIR Series) Circular No. 138 dated June 03, 2014, increased the LRS limit to USD 125,000 per financial year from USD 75,000. This was notified in our Corporate Update issue for June, 2014.

RBI has further clarified that the LRS can now also be used for acquisition of immovable property outside India.

[Source: A.P. (DIR Series) Circular No. 5 dated July 17, 2014]India.

[Source: A.P. (DIR Series) Circular No. 5 dated July 17, 2014]

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III. Foreign Direct Investment ('FDI') – Reporting under FDI Scheme | *Author: Shamik Sama, New Delhi*

The Department of Industrial Policy and Promotion ('DIPP'), Ministry of Commerce & Industry, Government of India had vide its Press Note No. 4 (2014 Series) dated June 26, 2014, decided to switch over from National Industrial Classification 1987 ('NIC-1987') to NIC-2008. This was notified in our Corporate Update issue for June, 2014.

Hence, it has been notified by the RBI that Indian Companies are now required to report the NIC Codes in the FC-GPR and FC-TRS forms as per the NIC 2008 version, with effect from July 18, 2014.

Further, it has also been decided by the RBI to introduce a uniform State and District code list for reporting of details of FDI by Indian companies in Form FC-GPR. The uniform State and District code list can be accessed on the RBI website.

[Source: A.P. (DIR Series) Circular No. 6 dated July 18, 2014]

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IV. Review of all in cost ceiling | *Author: Shamik Sama, New Delhi*

a) Trade Credits

It has been decided by RBI that the all-in-cost ceilings mentioned below, which was earlier applicable till June 30, 2014, will continue to be applicable till December 31, 2014 and subject to review thereafter.

Maturity Period	All-in-Cost Ceilings over 6 months LIBOR*
Upto one year	350 basis points
More than one year and up to three years	
More than three years and up to five years	
* for the respective currency of credit or applicable benchmark	

b) External Commercial Borrowings ('ECBs')

It has been decided by RBI that the all-in-cost ceilings mentioned below, which was earlier applicable till June 30, 2014, will continue to be applicable till December 31, 2014 and subject to review thereafter.

Average Maturity Period	All-in-cost over 6 month LIBOR*
Three years and up to five years	350 bps
More than five years	500 bps
* for the respective currency of borrowing or applicable benchmark	

[Source: A.P. (DIR Series) Circular No. 16 & 17 dated July 28, 2014]

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V. FDI in India - Issue/Transfer of Shares including Compulsorily Preference Shares and Compulsorily Convertible Debentures – Revised Pricing guidelines | *Author: Shamik Sama, New Delhi*

a) For listed Companies

- The issue and transfer of shares including compulsorily convertible preference shares and compulsorily convertible debentures shall be as per SEBI guidelines;

- The pricing guidelines for FDI instruments with optionality clause shall continue to be in accordance with A.P. (DIR Series) Circular No. 86 dated January 9, 2014, i.e., the non-resident investor shall be eligible to exit at the market price prevailing on the recognised stock exchanges subject to lock-in-period as stipulated, without any assured return.

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b) For Unlisted Companies

- According to the extant guidelines, pricing was to be worked out on Discounted Free Cash Flow Method on arm's length basis. RBI has now prescribed that pricing will be worked out as per internationally accepted pricing methodology. The new guidelines have come into effect from July 8, 2014;

- The issue and transfer of shares including compulsorily convertible preference shares and compulsorily convertible debentures with or without optionality clauses shall be at a price worked out as per any internationally accepted pricing methodology on arm's length basis.

RBI has now prescribed that an Indian company taking on record in its books any transfer of its shares or convertible debenture by way of sale from a resident to a non-resident and a non-resident to a resident shall disclose in its balance sheet for the financial year, in which the transaction took place, the details of valuation of share or convertible debentures, the pricing methodology adopted for the same as well as the agency that has given/certified the valuation.

[Source: A.P. (DIR Series) Circular No. 04 dated July 15, 2014]

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VI. Issue of Partly Paid Shares and Warrants by Indian Companies to Foreign Investors |

Author: Shamik Sama, New Delhi

It has been decided by the RBI that partly paid equity shares and warrants issued by an Indian Company in accordance with the provision of the Companies Act, 2013 and the SEBI guidelines, as applicable, shall be eligible instruments for the purpose of FDI and foreign portfolio investment ('FPI') by Foreign Institutional Investors ('FIIs')/Registered Foreign Portfolio Investors ('RFPIs') subject to compliance with FDI and FPI schemes. Issue of these instruments need compliance with following conditions:

a) Pricing

- Partly paid equity share: The pricing of the partly paid equity shares shall be determined upfront and 25% of the total consideration amount (including share premium, if any), shall also be received upfront; The balance consideration towards fully paid equity shares shall generally be received within a period of 12 months.

- Warrants: The pricing of the warrants and price/ con version formula shall be determined upfront and 25% of the consideration amount shall also be received upfront. The balance consideration towards fully paid up equity shares shall generally be received within a period of 18 months.

The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such warrants, in accordance with the extant FEMA Regulations and pricing guidelines stipulated by RBI from time to time. Thus, Investee company shall be free to receive consideration more than the pre-agreed price.

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b) Reporting

The Reporting guidelines for partly paid equity shares and warrants are now prescribed by RBI as per details given in RBI Circular No. 3 dated July 14, 2014.

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c) Compliance:

The onus of compliance of all the conditions under FEMA as regards entry route, sectoral caps and all other conditions under FDI guidelines shall be on the Investee company in case of issue of partly paid shares /warrants as well as upon resident transferor or transferee in accordance with extant guidelines in case of transfer of partly- paid shares/warrants. The onus of giving notice required under the provisions of the Companies Act, 2013 for transfer of partly-paid shares shall also be on the Investee company. The onus of compliance with individual limit below 10% (ten per cent) of the total paid-up equity capital shall be on each FII/RFPI. Further, the aggregate investments of all FIIs/RFPIs put together shall not exceed the applicable aggregate limit for each issue of partly paid shares.

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d) Other Conditions:

- The IC whose activity/ sector fall under government route would require prior approval of the Foreign In vestment Promotion Board (FIPB), Government of India for issue of partly-paid shares/ warrants.

- The forfeiture of the amount paid upfront on non-payment of call money shall be in accordance with the provisions of the Companies Act, 2013 and Income tax provisions, as applicable. - The company while issuing partly paid shares or warrants shall ensure that the sectoral caps are not breached even after the shares get fully paid-up or warrants get converted into fully paid equity shares. Similarly, the

  Non-resident investors acquiring partly paid shares or convertible debentures or warrants shall ensure that the sectoral caps are not breached even after the shares get fully paid-up or warrants get converted into fully paid equity shares.

- The deferment of payment of consideration amount or shortfall in receipt of consideration amount as per applicable pricing guidelines by the foreign investors will not be covered under these guidelines so as to be treated as subscription to partly paid shares and warrants. Thus, the Investee company under these guidelines for issue/ transfer of partly-paid shares/warrants, shall require to comply with the requirements under the Companies Act, 2013 for issuance of partly paid shares and warrants

[Source: A.P. (DIR Series) Circular No. 03 dated July 14, 2014]

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VII. Refinancing of External Commercial Borrowings ('ECB') at lower all-in-cost – Simplification of procedure | *Author: Shamik Sama, New Delhi*

As per the erstwhile provisions of the Foreign Exchange Management Act, 1999 ('FEMA'), refinancing of existing ECB by raising fresh ECB at lower all-in-cost is permitted subject to the condition that the outstanding maturity of the original loan is being maintained. However, where the Average Maturity Period ('AMP') of the fresh ECB used to be is more than the residual maturity of existing ECB, they were to be examined by the RBI under the approval route. On a review, it has been announced by the RBI that even where the AMP of the fresh ECB exceeds the residual maturity of the existing ECB, AD Categoy - I Banks will now empowered to approve such case, subject to the following conditions:

- Both the existing and fresh ECBs should be in compliance with the applicable guidelines;
- All-in-cost of fresh ECB should be less than that of the all-in-cost of existing ECB;
- Consent of the existing lender is available;
- Refinancing is to be undertaken before the maturity of the existing ECB;
- Borrower should not be in the default / Caution List of RBI and should not be under the investigation of the Directorate of Enforcement (DoE);
- Overseas branches / subsidiaries of Indian banks will not be permitted to extend ECB for refinancing an existing ECB; and
- All requirements in respect of reporting arrangements like filing of revised Form 83, etc. are followed.

Further, this facility will also be available even in those cases where existing ECBs were raised under the approval route subject to the amount of new ECBs being eligible to be raised under the automatic route.

[Source: A.P. (DIR Series) Circular No. 21 dated August 27, 2014]

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VIII. FDI in Defence Sector | *Author: Shamik Sama, New Delhi*

Recently, the Government of India ('GoI') have certain changes in the FDI policy for defence sector, vide Press Note No. 7 (2014 Series) dated August 26, 2014, issued by the Department of Industrial Policy and Promotion ('DIPP'), Ministry of Commerce & Industry ('MoC&I'), GoI.

In terms of above, following amendments have been approved in the Defence Sector:
-The sectoral cap has been increased from 26% to 49% under the approval route.
-For FDI above 49%, to be determined by the cabinet

committee on security ('CCS'), on the basis that it is likely to result in access to modern and 'state-of-art' technology in the country.
-The sectoral cap of 49% is composite and includes all kinds of foreign investors,i.e. FDI, FIIs, Foreign Portfolio Investors ('FPIs'), Non residents investors ('NRIs'), For eign Venture Capital Investors ('FVCI') and QPIs.
- Portfolio investments by FPIs/FIIs/NRIs/QPIs and invest ments by FVCIs together should not exceed 24% of total equity of the investee/joint venture ('JV') company. Also these portfolio investments would be under automatic route. Earlier, investments by FPIs/FIIs through portfolio investments were not allowed.
- The earlier condition that there has to be a three-year lock-in period for transfer of equity from one non-resi dent investor to another non-resident investor (exclud-ing NRIs and erstwhile OCBs with 60% or more NRIs stake), subject to prior approval of the Government, has been deleted in entirety.
- The applicant company seeking permission of the GoI for FDI upto 495 should be an Indian Company, which is owned and controlled by resident indian citizens.
- Chief Security Officer (CSO) of the investee/ JV company should be a resident indian citizen.
- Investee/ JV company should be a structured to be self-sufficient in areas of product design and development. The investee/ JV company along with manufacturing facility should also have maintenance and life cycle support facility of the product being manufactured in India.

[Source: Press Note No. 7 (2014 Series) dated August 26, 2014, DIPP, MoC&I, GoI]

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IX. Policy for Private Investment in Rail Infrastructure through Domestic and FDI | *Author: Shamik Sama, New Delhi*

As per the extant FDI policy, FDI was prohibited in Rail-way Transport (other than Mass Rapid Transport Sys-tems).However GoI, after reviewing its policy for private investment in rail infrastructure, decided to permit FDI in railway infrastructure, upto 100% under automatic route for construction, operation and maintenance of the following:
- Suburban corridor projects through Public Private Partnership (PPP)
- High speed train projects
- Dedicated freight lines
- Rolling stock including train sets and locomotives/ coaches manufacturing and maintenance facilities
- Railway electrification
- Signaling systems
- Freight terminal
- Passenger terminals
- Infrastructure in industrial parks pertaining to railway line/sidings including electrified railway lines and con-nectivities to the main railway line
- Mass rapid transport systems.

FDI in the above mentioned activities open to private sector participation including FDI is subject to sectoral guidelines of Ministry of Railways ('MoR'), GoI. Also, pro-posals involving FDI beyond 49% in sensitive areas from a security point of view will be brought by the MoR, be-fore the CCS for a consideration on a case to case basis.

[Source: Press Note No. 7 & 8 (2014 Series) dated August 26 & 27, 2014, DIPP, MoC&I, GoI]

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I. Definition of Related Party | *Author: Shamik Sama, New Delhi*

In the definition of related party contained in Sec 2(76) of the Companies Act, 2013, clause (v) which reads: "a public company in which a director or manager is a director or holds along with his relatives, more than two percent of its paid up share capital." the word 'or' has been substituted with the word 'and' vide MCA's Order dated July 09, 2014. This has been done to remove an inadvertent error that was defeating the intention of the said clause. This means that the concerned director or manager should be a director in a public company and should also hold along with his relatives more than 2% of its paid up share capital so as to constitute that public company as a related party.

Further, in sub-clause (iv) of Sec 2(76) which reads: "a private company in which a director or manager is a member or director", the words 'or his relative' have been inserted after the word 'manager' vide MCA's Order dated July 24, 2014. This has been done to remove the disharmonious interpretation of the said definition caused to due to absence of the word "relative" in sub-clause (iv), although such word appeared in sub-clauses (i), (ii), (iii) and (v) of the said clause (76). This implies that if the concerned director or manager himself is a member or director in a private company or his relative is a member or director in a private company, such private company would fall within the realms of related party.

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II. Clarification regarding Related Party transactions | *Author: Shamik Sama, New Delhi*

In the definition of related party contained in Sec 2(76) of the Companies Act, 2013, clause (v) which reads: "a public company in which a director or manager is a director or holds along with his relatives, more than two percent of its paid up share capital." the word 'or' has been substituted with the word 'and' vide MCA's Order dated July 09, 2014. This has been done to remove an inadvertent error that was defeating the intention of the said clause. This means that the concerned director or manager should be a director in a public company and should also hold along with his relatives more than 2% of its paid up share capital so as to constitute that public company as a related party.

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III. Transitional period for resolutions passed under Companies Act, 1956 | *Author: Shamik Sama, New Delhi*

The Ministry of Corporate Affairs (MCA) has issued general circular No. 32/2014 dated July 23, 2014, wherein it has clarified that resolutions passed or approved during the period commencing from September 01, 2013 till March 31, 2014 under relevant applicable provisions of the Companies Act, 1956 can be implemented under those provisions, notwithstanding the repeal of the relevant provision, subject however to the fulfilment of following two conditions:

- the implementation of resolution actually commenced before April 01, 2014 and;
- this transitional arrangement is available upto expiry of 1 year from the date of passing of resolution or six months from the commencement of corresponding provision under the Companies Act, 2013, whichever is later.

It has also been clarified that any amendment of the above mentioned resolution shall be in accordance with the relevant provisions of the Companies Act, 2013.

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IV. Appointment of an individual as Chairperson as well as MD or CEO | *Author:Rakhi Chanana, New Delhi*

As per first proviso to Sec 203(1), an individual shall not be appointed or reappointed as the Chairperson as well as the Managing director (MD) or Chief Executive Officer (CEO) of the Company at the same time except under certain prescribed conditions.

Further, as per second proviso to Sec 203(1), the Central Government was to notify the class of companies which are engaged in multiple businesses and have appointed one or more Chief Executive Officers for each such business, to which first proviso to Sec 203(1) shall not apply. Now, MCA has vide its notification dated July 25, 2014 notified that the class of companies to which first proviso to Sec 203(1) shall not be applicable are those public companies having paid-up share capital of rupees of rupees one hundred crore or more and annual turnover of rupees one thousand crore or more, which are engaged in multiple businesses and have appointed Chief Executive Officer for each such business.

It is also clarified that the paid-up share capital and the annual turnover shall be decided on the basis of latest audited balance sheet

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V. Company Law Settlement Scheme 2014 | *Author:Rakhi Chanana, New Delhi*

With the objective of providing an opportunity to defaulting companies who have not filed their annual return and financial statements, the Ministry of Corporate Affairs (MCA) has introduced Company Law Settlement Scheme, 2014 (CLSS) through issue of General Circular No. 34/2014 dated August 12, 2014.

Under this scheme, the defaulting companies (excluding foreign companies who have established their branch, liaison or project offices in India), can make good their default by filing annual return, financial statements (including Xbrl), compliance certificate and auditors appointment form, due for filing till June 30, 2014, upon payment of statutory filing fees along with 25% of the actual additional fees. The forms that can be filed under this scheme are - Form 20B, Form 21A, Form 23AC, 23CA, 23AC XBRL, 23ACA XBRL, Form 66 and Form 23B.

The companies shall be granted immunity from prosecution in respect of belated documents filed under CLSS. However, the immunity shall not be applicable in the matter of any appeal pending before the court of law and in case of management disputes of the company pending before the court of law or tribunal.

Thus by availing this scheme, the companies can save 75% of the additional fees and will also be provided immunity in respect of belated documents filed under the scheme.

In addition, this scheme gives an opportunity for inactive companies to get their companies declared as 'dormant company' under Section 455 of the Companies Act, 2013 by a filing a simple application at reduced fees and accordingly be subject to minimal compliance requirements or may also apply for striking off the name of the company.

This scheme has come in force from August 15, 2014 and shall remain in force upto October 15, 2014. This scheme has come in force from August 15, 2014 and shall remain in force upto October 15, 2014.

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IMPORTANT DATES TO REMEMBER

Particulars Date	Date
Deposit of TDS for the month of September, 2014	October 7, 2014
Deposit of Service Tax for Companies for the month of September, 2014	October 5, 2014 (by e-payment – October 6, 2014)

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