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Recent Decisions

- Installation & Commissioning services are not covered under the definition of Fee for Technical Services under section 9(1)(vii) of Income Tax Act, 1961
- Transfer Pricing

TAX | Indirect Taxes

- Audit of the Service Tax Assessees by the officers of Service tax Department
- Sale of used cars is not subject to VAT provided that four conditions stipulated in Section 6(3) of the DVAT Act for availing exemption under DVAT are duly met

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Saskia Bonenberger
Executive Director
WTS India

Dear Reader,

I wish you a very happy New Year 2015!

This year will bring us a lot of new laws through the new budget and will be very crucial for the new government in India. Foreign investors, especially from Europe are observing carefully, what changes might improve the bureaucratic burden. On the other hand the economical figures are improving, the media is more positive, signals for improvement.

In my opinion one very important litmus test for the new government will be the ability to perform legislatory changes in India and here especially the introduction of the GST, the Goods and Service Tax. In this issue you will find some explanations about developments on introduction of GST. The first step was the Constitution amendment bill 2014, which was introduced in Lok Sabha, the Indian Parliament on December 19 but not yet passed. But there are still a lot of steps ahead. Especially the consent in the Rajya Sabha, (the Council of States or the upper house in the Indian Parliament) will be very important. We will keep you informed about this exciting project.

In this issue you will also find a very important judgement for Plant and Machine Industry concerning Installation and Commissioning and Fee for Technical Services and some important key amendments proposed in the Companies Bill.

Yours sincerely

Saskia Bonenberger

I. Installation & Commissioning services are not covered under the definition of Fee for Technical Services under section 9(1)(vii) of Income Tax Act, 1961 |

Author: Harpreet Singh, New Delhi

Bennet Coleman & Co. Ltd. ('assessee') has entered into an agreement with M/s FERAG AG, Switzerland for supply of heavy plant and machinery along with installation and commissioning of the same. The supplier was under an obligation for training the employees of the assessee. Two separate contracts were entered, one for supply of machine and other for related services. The payment was made to M/s FERAG AG and no TDS was deducted on it. The AO issued notice under section 201(1) and imposed interest under section 201(1A) of the Act.

The assessee appealed before the Learned Commissioner of Income-tax (Appeals) ['CIT(A)'] who allowed the appeal partially in favour of the assessee. The CIT(A) relied upon the definition of the expression 'assembly' as appearing in Black's Law Dictionary, The New International Webster's Students' Dictionary and Little Oxford Dictionary, and held that the installation and commissioning of the components/units of the mail-room equipment was 'assembly' under Explanation 2 to Section 9(1)(vii) of the Act. CIT(A) placed reliance on the decision of the ITAT Hyderabad in the case of ITO vs National Mineral Development Corporation Ltd 42 ITD570. CIT(A) concluded that 75% of the remittance made by the assessee was towards installation and commissioning and hence was not Fees for Technical Services ('FTS') as defined in Explanation 2 to Section 9(1)(vii) of the Act and therefore, not chargeable to tax in the hands of FERAG AG. However, the balance 25% ofthe remittance was towards training of the employees of the assessee, which was chargeable to tax as FTS.

The department and the assessee filed appeals before the Hon'ble ITAT against the said order. The assessee argued that although two separate contracts were entered but it was one comprehensive activity and thus the contract cannot be separated and it is not taxable under FTS. This argument was not accepted by the Tribunal relying upon the judgement of Hon'ble Supreme Court in case of Ishikawajima-Harima Heavy Industries vs DIT 288 ITR 408 wherein it was observed that the supply obligation is distinct and separate from the service obligation.

The assessee further argued that the installation and commissioning would amount to assembly which is specifically excluded from the definition of FTS under Explanation 2 to Section 9(1)(vii) of the Act. This contention of the assesse was upheld by Hon'ble Tribunal. However, it was held that training of employees of the assessee does not fall within the meaning of assembly.

It was also observed that the services rendered by FERAG AG towards installation and commissioning of the mail-room equipment and training are FTS as defined under the Act, the consideration paid towards these services are only taxable in Switzerland in the hands of FERAG AG, by virtue of the provisions of Article 14 of the India-Switzerland DTAA, as Article 14 overrides Article 12(4) while defining the term 'Professional Services'. However, such independent engineering activities would not cover training given to the employees of the assessee as training activity may be connected to an engineering concern, but that by itself, would not constitute training, to be an engineering activity so as to fall within 'professional services' under Article 14 of the tax treaty. The argument of the tax department that Article 14 applies only to individuals is misconceived in the light of the wording in India-Switzerland tax treaty refers to 'residents of a contracting state' and hence it is not restricted to individuals.

It was observed by the Hon'ble Tribunal that the estimation of 25% of consideration towards total installation, commissioning and training charges (CHF 664,000) as attributable towards training the employees of the assessee is on a higher side and also against the facts, as submitted by the AR in the course of hearing. Therefore, out of total training charges of only CHF 17,500 as given in the break up provided by the vendor, a reasonable estimate of 25% of CHF 17,500 is attributable to training and hence taxable in India. The appeal was partly allowed in favour of the assessee.

[Source: Bennet Coleman & Co. Ltd. Vs ITO (TDS) - ITA No. 7315/Mum/2008& ITA No. 57/Mum/2009]

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II. Transfer Pricing | *Author: Harpreet Singh, New Delhi*

A little over a month after division bench of Bombay High Court ruled in favour of telecom major Vodafone in transfer pricing case, the same court ruled in favour of Shell India on the same principle as laid down in Vodafone case. The Bombay High Court in the case of Shell India has held that issuance of shares by an Indian company to its foreign parent is not exigible to transfer pricing provisions as there is no income arising there from, rejecting the department's argument that the facts of Shell case are distinguishable from Vodafone's case.

The decision of Vodafone is likely to be accepted by the tax department and the department is not contemplating any appeal against the same, which is expected to be shortly clarified.

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TAX Indirect Tax
Service Tax
Recent Notification

I. Audit of the Service Tax Assessees by the officers of Service tax Department | *Author: Shashank Goel, New Delhi*

Vide judgment of Travelite (India) Pvt Ltd Vs UOI, the Hon'ble High Court had held Rule 5A(2) of Service Tax Rules, 1994 as ultra vires. Rule 5A(2) before being declared ultra vires, read as under:

"(2) Every assessee shall, on demand, make available to the officer authorised under sub-rule (1) or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India, within a reasonable time not exceeding fifteen working days from the day when such demand is made, or such further period as may be allowed by such officer or the audit party, as the case may be, -

(i) The records as mentioned in sub-rule (2) of rule 5;
(ii) Trial balance or its equivalent; and
(iii) The income-tax audit report, if any, under section 44AB of the Income-tax Act, 1961 (43 of 1961), for the scrutiny of the officer or audit party, as the case may be."
For detailed discussion on the Travelite (India) Pvt Ltd judgment, please refer our earlier Corporate Update for the month of July & August, 2014.

In order to overcome the difficulties being faced by the Department in conducting Audits, due to the judgment of Travelite (India) Pvt Ltd, the Revenue Authorities has come up with Notification No 23/2014-ST, dated December 5, 2014 read with Circular No 181/7/2014-ST, dated December 10, 2014 wherein new Rule 5A(2) has been inserted in the Service tax Rules, 1994.
The New Rule 5A(2) read as under:

"(2) Every Assessee, shall, on demand make available to the officer empowered under Sub-rule (1) or the audit party deputed by the Commissioner or the Comptroller and Auditor General of India, or a cost accountant or chartered accountant nominated under Section 72A of the Finance Act, 1994-

(i) The records maintained or prepared by him in terms of sub-rule (2) of Rule 5;
(ii) The cost audit reports, if any, under Section 148 of the Companies Act, 2013 (18 of 2013); and
(iii) The Income tax audit report, if any, under Section 44AB of the Income tax act, 1961 (43 of 1961),

For scrutiny of the officer or the audit party, or the cost accountant or chartered accountant, within the time limit specified by the said officer or the audit party or

the cost accountant or chartered accountant, as the case may be."

The Revenue Authorities in their clarification issued vide

Circular No 181/7/2014-ST, dated December 10, 2014 has stated that the New Rule provides for scrutiny of records by an officer authorised by the Commissioner or the Audit Party deputed by the Commissioner or CAG and such scrutiny essentially constitutes Audit by the Audit Party consisting of the Departmental officers.

It has been clarified that the Hon'ble High Court of Delhi in the judgment dated 04.08.2014 in the case of M/s Travelite (India) [2014-TIOL-1304-HC-DEL-ST] had quashed rule 5A(2) of the Service Tax Rules, 1994 on the ground that the powers to conduct audit envisaged in the rule did not have appropriate statutory backing. This judgment can now be distinguished as a clear statutory backing for the rule now exists in section 94(2)(k) of the said Act.

Section 94(2)(k) provides that:

"(k) Imposition, on persons liable to pay service tax, for the proper levy and collection of tax, of duty of furnishing information, keeping records and the manner in which such records shall be verified."

It has been clarified that the expression "verified" used in Section 94(2)(k) of the Finance Act is of wide import and would include within its scope, Audit by the Departmental officers, as the procedure prescribed for Audit is essentially a procedure for verification mandated in the Statute.

Therefore, the judgment of the Hon'ble High Court of Delhi in the Travelite case has now been countered by the Revenue Authorities by way of re-introduction of Rule 5A(2).

[Source: Notification No 23/2014-ST, dated December 5, 2014 read with Circular No 181/7/2014-ST, dated December 10, 2014]

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Value Added Tax
Recent Decision

I. Sale of used cars is not subject to VAT provided that four conditions stipulated in Section 6(3) of the DVAT Act for availing exemption under DVAT are duly met |

Author: Shashank Goel, New Delhi

In the present case, the issue arose whether a person who is registered under DVAT for carrying on its business which does not include purchase and sale of Motor Vehicle i.e., dealing in Motor Vehicle, is liable to pay VAT when he sells Motor Vehicle used by him for his business.
In the case which came up before the Delhi High Court the facts were briefly as under:

- The Appellant dealer purchased Motor Vehicle which he used for manufacture or trading of taxable and non-taxable goods. The Dealer paid VAT on purchase of Motor Vehicle, but did not avail VAT credit.
  After using them, he sold the Motor Vehicle and did not pay VAT on such sales.

- The Authorities and VAT Tribunal held that the Appellant was liable to pay VAT on the sale effected by him.

- On Appeal, the Hon'ble High Court held as under:

- Motor Vehicle are Capital goods in a business like that of the Appellant.
- It was factually found that the Appellant was not dealing / trading in Motor Vehicle but was only using them for manufacturing or trading of taxable and non-taxable goods.
- Based on the above facts, the High Court found that the Appellant would be able to claim exemption from VAT on sale, provided the conditions laid down in Section 6(3) of the DVAT Act which reads as under:
  "Where a dealer sells Capital Gods which he has used since the time of purchase exclusively for purposes other than making non-taxed sale of goods, and has not claimed a tax credit in respect of such capital goods under Section 9, the sale of such Capital goods shall be exempt from tax."

•The Hon'ble High Court held that in this case, the Appel lant fulfilled all the conditions laid down in Section 6(3) of the DVAT Act.
The above is a landmark judgment as it has narrowed the ambiguity hitherto prevailed whether sale of mo tor vehicles by such entities would suffer VAT.

[Source: Anand Decors and Others Vs. Commissioner of Trade And Taxes, New Delhi, Manu/DE/3526/2014]

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GOODS AND SERVICE TAX | *Author: Shashank Goel, New Delhi*

1. The Introduction of Goods and Services Tax ("GST") has been under consideration of Government of India for considerable time.

2. In the year 2009, the Government brought out the "First Discussion Paper" on GST broadly out lining the proposed scheme of GST.

3. Since the present Government took over in June 2014, introduction of GST has been one of the priority areas of reform.

4. The present Union Finance Minister (FM) in his Budget speech, while presenting the Union Budget for 2014-2015 made the following observations on GST:

   "The debate whether to introduce a Goods and Services Tax (GST) must now come to an end. We have discussed the issue for the past many years. Some States have been apprehensive about surrendering their taxation jurisdiction; others want to be ad equately compensated. I have discussed the matter with the States both individually and collectively. I do hope we are able to find a solution in the course of this year and approve the legislative scheme which enables the introduction of GST. This will streamline the tax administration, avoid harassment of the busi ness and result in higher revenue collection both for the Centre and the States. I assure all States that gov ernment will be more than fair in dealing with them".

5. As a follow-up, the FM has had extensive discussions with the state Government on the introduction of GST.

6. As a sequel to such discussions, the Government has introduced a Constitution Amendment Bill ["The Con stitution (One Hundred and Twenty Second Amend ment) Bill, 2014] in Lok Sabha, on December 19, 2014.

7. The statement of objects and reasons for introduction of the above Bill state as under :

   "The Constitution is proposed to be amended to intro duce the goods and service tax for conferring concur rent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. The goods and services tax shall replace a number of indirect taxes being levied by the Union and the State Governments and is intended to remove cascading ef fect of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied on all transactions involving supply of goods and ser vices, except those which are kept out of the purview of goods and services tax".

8. The Bill seeks to achieve the above objectives, as per provisions made in the Bill.

9. The Salient features of the Scheme of GST, as could be broadly determined from the Bill and First Discussion paper are as under:

9.1 The GST will be levied on each transaction of supply of goods or services or both.

9.2 The GST will replace a number of indirect taxes pres ently being levied by the Union and the States.

9.3 As per the First Discussion Paper brought out by the Government in 2009, it is broadly assumed that the following indirect taxes will be subsumed in GST:

Central Levies	State levies
Central Excise Duty	State Value Added Tax/ Sales Tax
Additional Excise Duty	Entertainment Tax(Other than the tax levied by the local bodies)
Excise Duty levied under Medical and Toilet preparations (Excise Duty) Act, 1955	Octroi and Entry Tax
Additional Customs Duty	Purchase Tax
Special Additional Duty of Customs	Luxury Tax
Central Surcharges and Cesses	Taxes on Lottery , betting and gambling
Service Tax	State surcharges and cesses
Central Sales Tax	

9.4 Both the Union as well as the states shall have concurrent power to make laws with respect to the GST imposed by the Union/States respectively.

An enabling amendment to the Constitution has been proposed by introducing a new Article 246A which reads as under:

"246A(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State".

9.5 Notwithstanding Article 246A (1) Parliament will have exclusive power to make laws with respect to GST on inter-state trade or commerce. Further, by vir tue of newly proposed Article 269A, the import into the territory of India shall be deemed to be supply of goods or of services or both in the course of inter-state trade or commerce (vide explanation under Article 269A).

9.6 The Bill contemplates establishment of GST Council, which shall make recommendations to Union and the States on:

a) "The taxes, cesses and surcharge levied by the Union, the States and the local bodies which may be sub sumed in the goods and services tax;
b) The goods and services that may be subjected to, or exempted from the goods and services tax;
c) Model Goods and Services Tax Laws, principles of levy apportionment of integrated Goods and Ser-vices Tax
and the principles that govern the place of supply;
d) The threshold limit of turnover below which goods and services may be exempted from goods and ser vices tax;
e) The rates including floor rates with bands of goods and services tax;
f) Any special rate or rates for a specified period, toraise additional resources during any natural calamity or disaster;
g) Special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Ma nipur, Meghalaya, Mizoram, Nagaland , Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and
h) Any other matter relating to the goods and services ttax, as the council may decide."

9.7 As may be seen, the Bill does not contain details of the indirect taxes that will be subsumed in the GST. This will be recommended by the GST council. However, as seen from the First Discussions Paper, the indirect taxes that may be subsumed in the GST may be as per Table in Para 9.3 above.

9.8 The Scheme of GST is likely as under:
- Central GST (CGST);
- State GST (SGST);
- Inter-State GST (IGST) (referred to as Integrated GST in the Bill).

9.9 Parliament will formulate the principle for deter mining the place of supply and also the place of origin from where supply of goods takes place in the course of Inter-state trade or commerce.

9.10 GST will be levied on every transactions of supply of goods or services or both, except alcoholic liquor for human consumption [It appears on such liquor, states will levy tax on sale, outside the purview of GST]

9.11 The term "services "are being defined to mean anything other than goods.

9.12 It is seen that GST on Petroleum & Petroleum prod ucts will be introduced on a date to be recommended by the GST council. [Till then, it is possible, the Centre may levy Excise duty on their manufacture & the state may levy Tax on their sales, outside the purview of GST law].

9.13 The IGST collected by the Centre will be appor tioned between the Union & the States, in the manner as may be provided by the Parliament.

9.14 An additional tax on supply of goods, [Note: "ser vices" are omitted], not exceeding one percent, in the course of Inter-state trade or Commerce will be levied and collected by the Union for a period of two years or such other period as GST council may recommend.

9.15 Parliament by law shall provide for compensation to the states for loss of revenue for a period not exceeding by 5 years.

9.16 The existing laws relating to tax on goods or services in force before the commencement of the Act, which is inconsistent with the Constitution of India as proposed to be amended, shall continue to be in force until amended or repealed or until expiration of one year from such commencement, whichever is earlier.

9.17 GST Laws may provide for exemptions.

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Legal
FOREIGN EXCHANGE MANAGEMENT ACT

I. Foreign Exchange Management (Deposit) Regulation, 2000 – Exemptions |

Author: Shamik Sahu, New Delhi

Presently as Reserve Bank Of India ('RBI') guidelines, United Nations or its subsidiary or affiliates are excempt from Foriegn Exchange Management (Deposit), Regulation, 2000, issued vide Notification No. FEMA 5/2000-RB dated May 3, 2000 (as amended from time to time).

RBI has now decided to extend the above said regulation to multilateral organisation of which India is a member.

[Source: A.P. (DIR Series) Circular No. 51 dated December 17, 2014]

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II. Overseas Direct Investments ('ODIs') by Indian Party – Rationalisation/Liberalisation |

Author: Shamik Sahu, New Delhi

RBI has decided to grant further flexibility to the Indian Party by rationalizing/liberalizing ODI regulations as follows:

- Creation of charge on shares of Joint Venture ('JV') / Wholly owned Subsidiary ('WoS') / Step down Subsidiary ('SDS') in favour of domestic / overseas lender:

In terms of the extant FEMA provisions, creations of charge (pledge) on the shares of an JV / WOS of an Indian party and / or the concerned JV / WOS is under the automatiic route.

It has been decided that the designated Authorised Dealer Bank ('AD Bank') may permit creation of charge / pledge on the shares of the JV / WOS / SDS (irrespective of the layer) of an Indian party in favour of domestic and overseas lender for securing the funded and / or non-funded facility to be availed of by the Indian Party or by its group companies / sister concern / associate concern or by any of its JV / WOS / SDS (irrespective of the level) under the automatic route subject of the following:

- The Indian party is complying with the provisions under Regulation 6 (and Regulation 7, if applicable) of the Notification No. FEMA. 120/ RB-2004 dated July 7, 2004 for undertaking financial commitment;
- Compliance to the provisions under Regulation 18 of the said Notification;
- The period of charge, if not specified upfront, may be co-terminus with the period of end use (like loan or other facility) for which charge has been created;
- The loan / facility availed by the JV / WOS / SDS from the domestic / overseas lender shall be utilized only for its core business activities overseas and not for investing back in India in any manner whatsoever;
- A certificate from the Statutory Auditors' of the Indian party, to the effect that the loan / facility availed by the JV / WOS / SDS has not been utilized for direct or indirect investments in India, is to be obtained and kept by the designated AD;
- The overseas lender undertakes that, in the event of enforcement of charge, they shall transfer the domes tic assets by way of sale to a resident only;
- The invocation of charge resulting into the domestic lender acquiring the shares of the overseas JV / WOS / step down subsidiary shall be governed by the extant FEMA provisions / regulations issued by the RBI from time to time;
  The facilities (funded or non-funded) extended by the domestic lender to the Indian party or to its group / sis ter / associate concern or to any of its overseas JV / WOS / SDS shall also be governed by the prudential norms and other guidelines issued by the Department of Banking Regulation (DBR, the erstwhile DBOD), RBI from time to time; and
- The matter relating to the setting up / acquiring the multi-layered structure of overseas entities by the In dian party, wherever applicable, is under the examina tion of the RBI and the decision taken in this regard shall be conveyed in due course for necessary compli ance at AD Bank / Indian party level.

•Creation charge on overseas assets in favour of domes tic lender Creation of charge on the overseas assets of JV / WOS / SDS of an Indian party in favour of a domestic lender to the Indian party or to its group / sister / as sociate concern or to any of its overseas JV / WOS / SDS requires its prior approval of the RBI.
It has been decided that the designated AD bank may permit creation of charge (by way of hypothecation, mortgage, or otherwise) on the overseas assets (ex cluding the shares) of the JV / WOS SDS (irrespective of the level) of an indian party in favour of domestic lender for securing the funded and or/ non-funded fa cility to be availed of by the indian party or by its group companies/ sister concerns / associate concerns or by its overseas JV / WOS / SDS (irrespective of the level) under the automatic route subject of the folllowing:

- The Indian party is complying with the provisions under Regulation 6 (and Regulation 7, if applicable) of the said Notification for undertaking financial commit ment;
- Compliance to the provisions under Regulation 18A(2) of the said Notification;
- The overseas assets, on which charge is being created, are not securitized;
- The period of charge, if not specified upfront, may be co-terminus with the period of end use (like loan or other facility) for which charge has been created;
- The loan / facility availed by the JV / WOS / SDS from the domestic lender shall be utilized only for its core business activities overseas and not for investing back in India in any manner whatsoever;
- A certificate from the Statutory Auditors' of the Indian party, to the effect that the loan / facility availed by the JV / WOS / SDS has not been utilized for direct or indi rect
  investments in India, is to be obtained and kept by the designated AD Bank;
- The overseas lender undertakes that, in the event of enforcement of charge, they shall transfer the domes tic assets by way of sale to a resident only;
- In case of invocation of charge, the resultant remit tance of the proceeds exceeding the prescribed limit of the financial commitment of the Indian party (pre vailed at the time of creation of charge) shall require prior approval of the RBI;
- Wherever creation of charge involves pledge of shares of an Indian company, the pledge shall also be gov erned by the extant FEMA provisions / regulations issued by the RBI and the consolidated Foreign Direct Investment ('FDI') policy issued by the Government of India from time to time; and
- The matter relating to the setting up / acquiring the multi-layered structure of overseas entities by the In dian party, wherever applicable, is under the examina tion of the RBI and the decision taken in this regard shall be conveyed in due course for necessary compli ance at AD Bank / Indian party level.

•Creation charge on overseas assets in favour of domes tic lender
Creation of charge on the overseas assets of JV / WOS / SDS of an Indian party in favour of a domestic lender to the Indian party or to its group / sister / associate concern or to any of its overseas JV / WOS / SDS requires its prior approval of the RBI.
It has been decided that the designated AD bank may permit creation of charge (by way of hypothecation, mortgage, or otherwise) on the overseas assets (ex cluding the shares) of the JV / WOS SDS (irrespective of the level) of an indian party in favour of domestic lender for securing the funded and or/ non-funded fa cility to be availed of by the indian party or by its group companies/ sister concerns / associate concerns or by its overseas JV / WOS / SDS (irrespective of the level) under the automatic route subject of the folllowing:

- The Indian party is complying with the provisions under

Regulation 6 (and Regulation 7, if applicable) of the said Notification for undertaking financial commitment;
- Compliance to the provisions under Regulation 18A(2) of the said Notification;
- The overseas assets, on which charge is being created, are not securitized;
- The period of charge, if not specified upfront, may be co-terminus with the period of end use (like loan or other facility) for which charge has been created;
- The loan / facility availed by the JV / WOS / SDS from the domestic lender shall be utilized only for its core business activities overseas and not for investing back in India in any manner whatsoever;
- A certificate from the Statutory Auditors' of the Indian party, to the effect that the loan / facility availed by the JV / WOS / SDS has not been utilized for direct or indi rect investments in India, is to be obtained and kept by the designated AD Bank;
- The invocation of charge resulting into the domestic lender acquiring the overseas assets shall require prior approval of the RBI; and
- The matter relating to the setting up / acquiring the multi-layered structure of overseas entities by the In dian party, wherever applicable, is under the examina tion of the RBI and the decision taken in this regard shall be conveyed in due course for necessary compli- ance at AD Bank / Indian party level.The copy of the relevant circular has been enclosed as Annexure - II

[Source: A.P. (DIR Series) Circular No. 54 dated December 29, 2014]

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Legal
FOREIGN EXCHANGE MANAGEMENT ACT

III. Revised FDI policy on Construction Development Sector ('CDS') |

Author: Shamik Sahu, New Delhi

Recently The Government of India ('GoI') have made certain changes inthe FDI policy for CDS, vide Press Note No. 10 (2014 Series) dated December 03, 2014, issued by the Department of Industrial Policy and Promotion ('DIPP'), Ministry of Commerce & Industry ('MoC&I'), Goverment of India ('GoI'). [The copy of relevent Press Note has been enclosed as Annexure - III]

The Ammendments in the relevant paragraph of the extant FDI policy as contained in the Consolidated FDI Policy Circular 2014 are as follows:

I. 100 percent FDI under automatic route will be permit ted in the construction development sector.
II. Investment will be subject to the following condi tions:

(A) Minimum area to be developed under each project would be:

i. In case of development of serviced plots, there is no condition of minimum land,
ii. In case of construction development projects, a mini mum floor area of 20,000 sq. meters.
iii. In case of a combination project, any one of the afor estated two conditions will need to be complied with.

(B) The investee company will be required to bring minimum FDI of US$ 5 million within six months of commencement of the project. The commence ment of the project will be the date of approval of the building plan/lay out plan by the relevant statutory authority. Subsequent tranches of FDI can be brought till the period of ten years from the com mencement of the project or before the completion of the project, whichever expires earlier.

(C) The investor will be permitted to exit on completion of the project subject to development of trunk infra structure.

(D) The Government may, in view of facts and circum stances of a case, permit repatriation of FDI or transfer of stake by one non resident investor to another nonresident investor, before the completion

of the project. These proposals will be considered by FIPB on case to case basis.

(E) The project shall conform to the norms and stand ards, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable building control regula tions, bye-laws, rules, and other regulations of the State Government/Municipal/Local Body concerned.

(F) The Indian investee company will be permitted to sell only developed plots. For the purposes of this policy "developed plots" will mean plots where trunk infrastructure including roads, water supply, street lighting, drainage and sewerage, have been made available.

(G) The Indian investee company shall be responsible for obtaining all necessary approvals, including those of the building/layout plans, developing internal and peripheral areas and other infrastructure facili ties, payment of development, external develop ment and other charges and complying with all other requirements as prescribed under applicable rules/ byelaws/regulations of the State Government/ Mu nicipal/Local Body concerned.

(H) The State Government/ Municipal/ Local Body concerned, which approves the building / devel opment plans, will monitor compliance of the above conditions by the developer.

In terms of the above, following amendments have been approved in the CDS:
- No minimum land area requirement for develop ment of serviced plots
- For construction development projects, minimum area required to be developed - floor area of 20,000 sq. meter.
- Investee company to bring in a minimum FDI of US$ 5 million within six months of commencement of the project, i.e. the date of approval of the building plan/ lay out plan by the statutory authority. Further, sub sequent tranches of FDI can be brought till the period of ten years from the commencement of the project or before the completion of the project, whichever expires earlier.
- Investor can make an exit on completion of the project or after development of trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewage.
- On a case-to-case basis, repatriation of FDI or transfer of stake by one non-resident investor to another non-resident investor, before the completion of the project, might be allowed by the Government, under the ap proval route.
- The Indian investee company will be permitted to sell only developed plots, i.e.. plots where trunk infrastruc ture i.e. roads, water supply, street lighting, drainage and sewerage, have been made available.
- The Indian investee company shall be responsible for obtaining all necessary approvals including those of the building/layout plans, developing internal and peripheral areas and other infrastructure facilities, pay ment of development, external development and other charges and complying with all other require ments as prescribed under applicable rules/bye-laws/ regulations of the State Government/ Municipal/Local Body concerned.

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Legal
Corporate Law

I. Key amendments proposed in the Companies (Amendment) Bill, 2014 |

Author : Rakhi Chanana, New Delhi

To facilitate ease of doing business in India and deal with certain practical difficulties being faced by various stakeholders complying with some of the requirments of the Act, the Government introduced the companies (Amendment) Bill, 2014 [hereinafter referred to as "the bill"] in Lok Sabha on 02 December, 2014. The bill was approved by Lok Sabha on 17 December, 2014 and is pending for approval in the Rajya Sabha.

The proposed Amendments deal with related party transactions, fraud reported by auditors, public in-spection of Board resolutions, reponsibilities of audit committee, restriction on bail, making common seal optional, requirement of minimum paid-up share capi-tal, strength of benches for hearing winding up cases, jurisdiction of special courts to try offences.

Ammendmets are also being proposed in the act to

incorporate some of the provisions earlier left out inadvertently setting off of past losses/depreciation before declaring dividend and exemptions for giving of loans/guarantee/security by holding companies to its subsidiaries

The amendments proposed in the bill are briefly explained below:

•Minimum Paid up capital – The Act presently provides for minimum capital requirements as under:

- Private Company – Rs 1 lac
- Public Company – Rs 5 lacs

The amendments proposes that the minimum capital requirements will be prescribed seperately

• Common seal is optional – As per the existing provisions of Section 9 of the Act, upon incorporation of company, the company shall have a common seal. The Bill proposes to make the requirement to have a common seal optional, and accordingly suggests following amendments in the Act:

- omit the words "and a common seal" from Sec 9
- substitution of Sec 12(3)(b) with the following clause "have its name engraved in legible characters on its seal, if any"
- in Section 22(2) after the words "under its common seal" the words "if any" shall be inserted.
- in Sec 22(2) the following proviso shall be inserted:

"Provided that in case a company does not have a common seal, the authorisation under this sub-section shall be made by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary.";

- in Sec 22(3), the words ''and have the effect as if it were made under its common seal" shall be omitted
- in section 46(1), for the words "issued under the common seal of the company", the words "issued under the common seal, if any, of the company or signed by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary" shall be substituted.
- in section 223(4)(a), for the words "by the seal", the words "by the seal, if any," shall be substituted.

• Prescribing punishment for deposits – A new section 76A is being inserted to provide for punishment for deposits accepted in violation of the provisions of the Act, and/or failure to repay deposits or part thereof or interest due thereon within the time specified in the Act.

• Prohibiting public inspection of board resolutions – Currently, there are various sections in the Act including Sec 117, 179 and the rules made thereunder which require a company to file certified copy of its board resolutions passed for certain purposes, with Registrar of Companies (ROC). To keep the management decisions confidential, as demanded by corporates, the Bill proposes to prohibit public inspection of board resolutions filed with ROC.

• Declaration of dividend – The Bill proposes to provide for setting off of previous losses and depreciation in the Act itself, by inserting a new proviso after the third proviso to sec 123(1):-

"Provided also that no company shall declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set off against profit of the company for the current year.

• Transfer of shares to IEPF – The Bill proposes that only those shares in respect of which, dividend has not been paid or claimed for seven consecutive years or more shall be transferred to Investor Education Protection Fund (IEPF).

• Reporting of fraud by auditors – Section 143(12) read with Rule 13 of Companies (Audit and Auditors) Rules, 2014, provides that in case an auditor has reason to believe that an offence of fraud is being or has been committed in the company by its officers or employees, the auditor is required to report the matter to the Central Government. In this context, to address the demand of auditors for reporting of frauds to Central Government only beyond a certain threshold limit and to report the frauds to Audit Committee or the Board of Directors, as the case may be, below that threshold, the Bill proposes to make the following amendments:-

- Section 143(12) shall be substituted with the following sub-section-

"Notwithstanding anything contained in this section, if an auditor of a company in the course of the performance of his duties as auditor, has reason to believe that an offence of fraud involving such amount or amounts as may be prescribed, is being or has been committed in the company by its officers or employees, the auditor shall report the matter to the Central Government within such time and in such manner as may be prescribed:

Provided that in case of a fraud involving lesser than the specified amount, the auditor shall report the matter to the audit committee constituted under section 177 or to the Board in other cases within such time and in such manner as may be prescribed.

Provided further that the companies, whose auditors have reported frauds under this sub-section to the audit committee or the Board but not reported to the Central Government, shall disclose the details about such frauds in the Board's report in such manner as may be prescribed.

- Amendment to Sec 134(3) [Board's report] by insertion of new clause (ca) reproduced as under, after existing clause (c),

"(ca) details in respect of frauds reported by auditors under sub-section (12) of section 143 other than those which are reportable to the Central Government."

• Approval of Audit Committee for related party transactions – Currently, pursuant to the provisions of Sec 177(4)(iv), the Audit Committee needs to approve transactions and/or any subsequent modification of transactions of a company with related parties. With the objective to obviate the need to obtain approval of Audit Committee for each and every transaction, the Bill

proposes to amend Sec 177(4) by inserting the following proviso after existing clause (iv) -

Insertion of following proviso to clause (iv) of Sec 177(4)

"Provided that the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to such conditions as may be prescribed."

- Loan transactions - Currently, Rule 10 of Companies (Meetings of Board and its Powers) Rules, 2014, provides that any loan made, or any guarantee given or security provided by a holding company to its wholly owned subsidiary company (WOS) is exempt from the requirements of Sec 185. Also, any guarantee given or security provided by a holding company with respect to loan made by any bank or financial institution to its subsidiary company is exempt from the requirements of Sec 185.

The amendment proposes to incorporate the same in the concerned section also.

- Related Party transactions – For the purposes of approval from shareholders, for related party transactions, the amendment prescribes 'ordinary resolution' instead of 'special resolution'.
- In addition, the Bill also seeks to make certain amendments to Sections 212, 435(1), 436(1) and 419(4).

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Important Dates to Remember

Particulars	Date
Deposit of TDS for the month of January, 2015	February 7, 2015
Deposit of Service Tax for the month of January, 2015	February 5, 2014 (by e-payment – February 6, 2014)

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