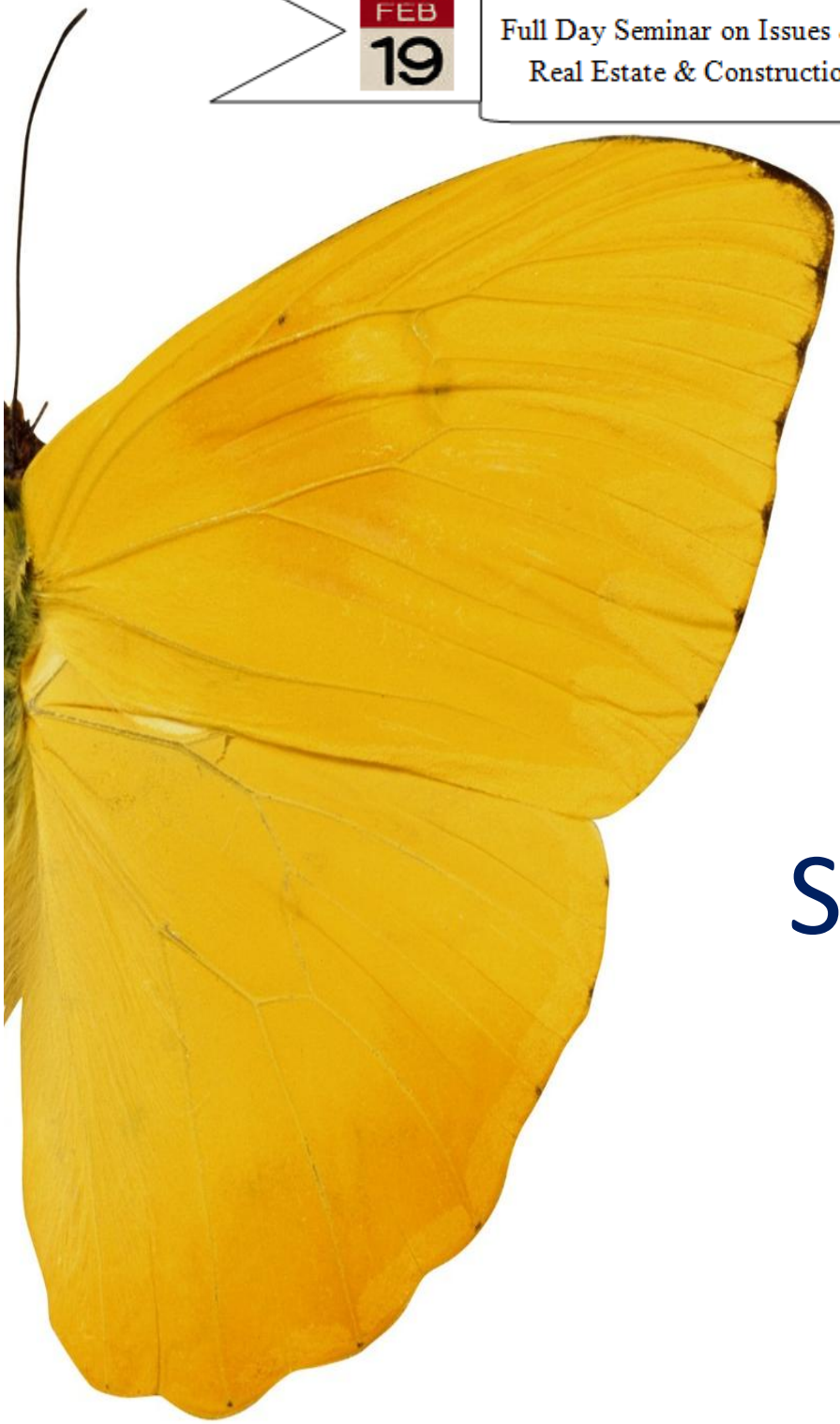

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By

SBS and Company LLP
Chartered Accountants

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FOREIGN TRADE POLICY

TRADE AGREEMENTS UNDER FTP – CERTAIN INSIGHTS

Contributed by CA Harsha

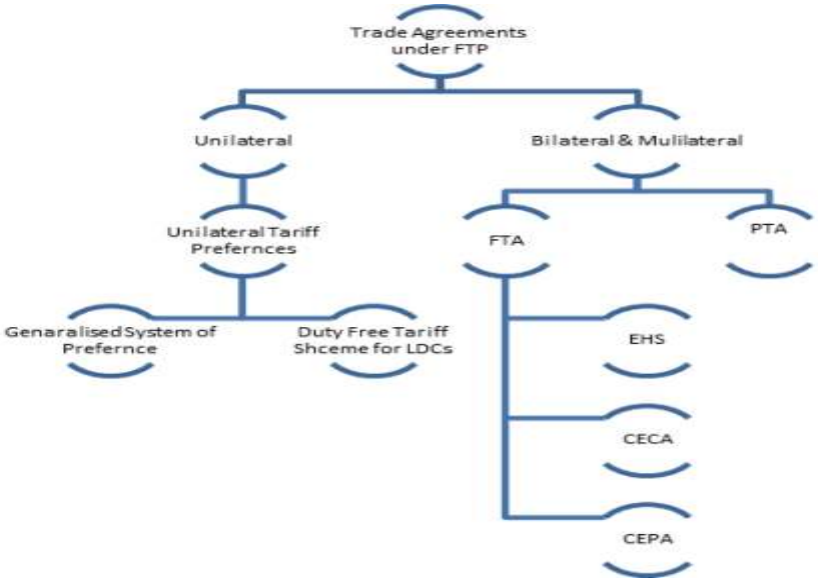
The role of trade agreements, either free trade or preferential trade has contributed a lot to the international trade. India has also entered various agreements with various countries in order to reduce the tariff based barriers between the contracting parties. The objective of this article is to throw light on the various agreements where India is party, so that the exporters and importers can take advantage of the same.

These agreements boost the confidence of the Indian exporters and place them ahead in the competition while dealing with the signatory parties. For example, a person located in country 'A' has an option to import certain goods say, computers either from India or country 'B'. If import is made from country 'B' the import duties shall be 20%. However, if the same goods are imported from India, the import duty for the person located in country 'A' is 0%, since India and country 'A' has entered an agreement.

Further, these agreements also attract investments from other non-signatory countries. For example, consider two countries 'P' and 'India' having an agreement. Country 'P' has high infrastructure cost and large domestic market. The companies located in country 'R' may decide to invest in country 'P' to cater to its domestic market. However, if India offers better business environment and it is having an agreement with country 'P', 'R' may decide to invest in India to cater to the needs of 'P'.

Hence, the agreements entered by India with other foreign countries contribute a lot to the exports and also safeguards the domestic manufactures from paying high import duties. The agreements generally aim at reducing or granting complete exemption from import duty when goods are imported to India from other signatory countries.

As far as the India is concerned, the agreements entered with other countries to participate in International Trade can be represented as under, for easy understanding:



As represented above, the agreements entered by India with various countries can be grouped under two main buckets namely Unilateral and Bilateral or Multilateral, which we shall understand in the following paragraphs.

Unilateral Tariff Preferences:

Unilateral tariff preferences benefits or concessions flow from one country to another country and there shall be no reciprocity. There are two types of unilateral tariff preferences namely 'Generalized System of Preference' (for brevity 'GSP') and 'Duty Free Tariff Preference Scheme' for Least Developed Countries.

Generalized System of Preference - GSP:

The GSP is a commercial policy instrument aimed towards development. The objective of GSP is to offer the developing countries a more preferential tariff compared to the developed countries. For example, an importer in New Zealand buys material from India, by virtue of GSP with New Zealand Government, such material might attract lower customs duty in New Zealand when compared with same import from United States of America.

As of now, Australia, Canada, EU, Iceland, Japan, New Zealand, Norway, Russian Federation, Belarus, Kazakhstan, Switzerland, Turkey and United States of America extend GSPs. The Indian exporters shall submit Certificate of Origin (for brevity 'CoO') issued by designated authorities to the importer, so that the importer can avail such reduced tariff or exemption as per the concerned GSP.

Duty Free Tariff Preference (DFTP) for Least Developed Countries:

One of the obligations from the sixth Ministerial Conference of WTO, also known as WTO Hong Kong Ministerial Conference (MC6) was to provide duty free tariff preferences for least developed countries. In order to stand up to this obligation, the Department of Commerce, India now provides duty free/preferential access to 98.2% of tariff lines. India has 31[1] least developed countries as beneficiaries to this scheme.

Bilateral or Multilateral Agreements:

Free Trade Agreements (for brevity 'FTA') and Preferential Trade Agreements (for brevity 'PTA') are either in form of 'bilateral agreements' where only India and counterpart alone entered into an agreement or in the form of 'multilateral agreements' where India and group of countries enter into an agreement. As on date, 619 notifications of RTA/FTAs had been received by WTO, where 413 RTA/FTAs are in force and there are 28 PTA's.[2]

Free Trade Agreements - FTA:

In terms of WTO, FTAs are defined as reciprocal trade agreements between two or more signatory countries. That is to say, in FTAs tariff on items covering substantial bilateral trade are eliminated between

[1]As on November, 2015
[2]Source: https://www.wto.org/

the signing countries, however the countries maintains an individual tariff structure when dealing with non-singing countries. Under FTAs the signing countries agrees on a list of goods called as negative list for which the FTA shall not be applicable. Except such goods mentioned in the negative list, all other goods can be freely traded between the signing countries. As on date India has entered 10 FTAs as per Para 2.103 of Handbook of Procedures. India is in the process of negotiating another 18 FTAs.

List of FTAs signed by India are:

1. India – Srilanka FTA;
2. Agreement on South Asia Free Trade Agreement (SAFTA);
3. Revised Agreement of Cooperation between Government of India and Nepal to control unauthorised trade;
4. India – Bhutan Agreement on Trade Commerce or Transit;
5. India – Thailand FTA – Early Harvest Scheme;
6. India - Singapore Comprehensive Economic Cooperation Agreement (CECA)
7. India - ASEAN CECA (Goods, Services and Investment)
8. India - South Korea Comprehensive Economic Partnership Agreement (CEPA)
9. India - Japan CEPA
10. India - Malaysia CECA

EHS/EHP:

Early Harvest Scheme/Early Harvest Programme is a forerunner to FTA between two trading partners. This is to help the two trading countries to identify certain products for tariff liberalization pending the conclusion of FTA negotiation. EHS has been used as a mechanism to build greater confidence amongst trading partners to prepare them for even bigger economic engagement.

CECA & CEPA:

Comprehensive Economic Co-operation Agreement (for brevity 'CECA') and Comprehensive Economic Partnership Agreement (for brevity 'CEPA') describes agreements which consists of an integrated package on goods, services and investments along with other areas including IPR.

EHS/EHP, CECA & CEPA are grouped under FTA.

Preferential Trade Agreements - PTA:

Under PTAs, two or more partners agree to reduce tariffs on agreed number of products, generally called positive list. Hence, PTAs do not cover substantial trade as like in FTAs. As of Feb 2016, India has entered 6 PTAs as per Para 2.103 of Handbook of Procedures.

List of PTAs signed by India are:

1. Asia Pacific Trade Agreement (APTA)
2. Global System of Trade Preferences (GSTP)
3. India - Afghanistan PTA
4. India - MERCOSUR PTA
5. India - Chile PTA
6. SAARC Preferential Trading Arrangement (SAPTA)

Global System of Trade Preference - GSTP:

GSTP is entered between developing countries to exchange tariff concession to limited products. India provides tariff concessions to selective products imported from 54 countries subject to submission of CoO issued by the concerned authorities in exporting country. The goods originating from participating countries and CoO issued should comply with Customs Tariff (Determination of Origin of Goods under the Agreement on Global System of Trade Preferences among Developing Countries) Rules, 1989.

Procedure for claiming concessions & exemptions under the above agreements – General:

The basic customs duty charged under Section 12 of the Customs Act, 1961 is exempted or reduced by virtue of FTAs or PTAs. It is to be noted that other customs duties like countervailing duties are not covered under FTAs or PTAs. Further, a corresponding notification has to be issued under customs law to operationalize the promises made under FTAs or PTAs. The person intending to export or import as per the FTAs or PTAs has to satisfy the conditions mentioned in such notifications along with any rules made thereunder. The essential pre-requisite in order to avail the concessions or exemptions, is the Certificate of Origin (for brevity 'CoO').

The general procedure in order to avail the concession and exemptions prescribed under the FTAs/PTAs is prescribed as under. Let us a take an example of Indian manufacturer who intends to import goods from Srilanka under the India – Sri Lanka Free Trade Agreement (for brevity 'ISLFTA').

In order to import goods which are specified in the above agreement, the importer has to approach an exporter located in Sri Lanka, obtain CoO issued by the designated Sri Lankan authorities from such exporter, submit the CoO to the customs authorities and claim such exemption or reduced duty as place in the ISLFTA.

In the same way, if an exporter located in India wants to export specified goods in the ISLFTA, the Indian exporter has to obtain CoO from the designated authorities and pass it on to the Sri Lankan buyer, wherein such person can claim the reduced import duty or exemption as per ISLFTA.

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INCOME TAX

INTERESTS UNDER SECTION 234B AND SECTION 234C – CERTAIN 'INTEREST' ING' ISSUES

Contributed by CA MHS Bhyrav

We all know that, every assessee as per section 208 of Income Tax Act, 1961 ("Act"), is required to pay income tax during a financial year in every case where the amount of such tax payable is ten thousand rupees or more. Such a tax is called as an advance tax. Failure to remit advance tax in accordance with the provisions laid down vide Section 208, ibid shall attract interest as per Section 234B and Section 234C.

The objective of this article is to highlight few instances/issues which are to be considered while arriving the amount on which interest has to be calculated under sections 234B and 234C of the Act. Before going to deal with such issues, in the best interest of the readers, we have referred the statutory provisions of Section 234B and 234C hereunder.

Section 234B - Interest for defaults in payment of advance tax:

234B(1) Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under section 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of section 210 is less than 90% of the assessed tax, the assessee shall be liable to pay simple interest at the rate of 1% for every month or part of a month comprised in the period from the 1st day of April next following such financial year to the date of determination of total income under section 143(1) and where a regular assessment is made, to the date of such regular assessment, on an amount equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid as aforesaid falls short of the assessed tax.

234C- Interest for deferment of advance tax:

Interest is payable u/s 234C if an assessee has not paid Advance Tax or underestimated installments of advance tax on the basis specified in 234C(1)(a), 234C(1)(b) which will be calculated on Tax on Returned Income.

Food for Thought:

A. Assessed Tax vs Tax on Returned Income:

1. From the above provisions, it is clear that Section 234B speaks about Assessed Tax whereas 234C deals with tax on returned income.

2. Hence 234B interest should be calculated based on Assessed Tax which is assessed as per section 143(1) or as per regular assessment (CIT v. Tulsyan NEC Ltd. [2011] (SC)). However, 234C interest to be calculated based on returned income.

3. So, in-spite of change in tax as per returned income and assessed income, there will be no change in 234C interest but there can be change in 234B interest.

Example: If the Return of Income filed by stating the Taxable Income of Rs. 250 crores which is Assessed by the AO by arriving Assessed Income as Rs. 275 crores then 234B interest to be calculated on assessed tax of Rs.275 crores where as 234C should be calculated on tax on returned income of Rs. 250 crores only.

B. Returned Income: is it Original Return / Revised Return or something else:

1. 234C refers to tax on returned income. However, 234C does not stressed on whether the income which has to be calculated should be based on the original return or revised return or any other document.

2. However, once a revised return was filed (within due date) then it will substitutes the original return hence Income as per Revised Return can be considered as Returned Income, the returned income referred to in section 234C means the total income declared in the return of income furnished by the assessee validly for the relevant assessment year. Accordingly, Income declared in Revised computation which is filed after the due date cannot be treated as Returned Income for the purpose of section 234C.

3. In South Eastern Coalfields Ltd Vs Jt. CIT (2003) 260 ITR (AT) 1 (Nag) it was held that "revised computation of income" filed before the assessing officer after the time-limit prescribed in section 139(5) cannot be treated as returned income of the assessee for the purpose of levy of interest under section 234C.

C. Tax Deducted at Source vs Tax Deductible at Source:

1. It is to be noted that in 234B interest, tax deducted at source is to be reduced from assessed tax, where as in 234C interest actual tax deductible at source is to be reduced from tax on returned income i.e., even though tax deducted at source is less than the tax deductible at source, assessee can reduce higher amount while calculating interest u/s 234C. (same treatment for TCS also)

   Example: M/s Cash Rich Ltd is having Fixed Deposits of Rs.750 crores during the F.Y.14-15 which will yield interest of Rs.71,81,87,600/- during the same financial year. Ideally Banker should have deduct TDS u/s 194A of Rs.7,18,18,760/- i.e., tax deductible at source is Rs.7,18,18,760/- however banker has deducted tds u/s 194A only Rs.5,25,00,000/- i.e., actual tax deducted is Rs.5,25,00,000/-

   In this case even though actual tds deducted was Rs.5,25,00,000/-, while arriving interest u/s 234C we can consider Rs.7,18,18,760/- to reduce from tax on returned income, where as for interest u/s 234B Rs.5,25,00,000/- should only consider while reducing from assessed tax.

2. However, we have come across situations where few books on direct taxes and ready reckoners, it was suggested that actual tax deducted should only be considered for both 234B and 234C.

3. Whereas the Act is very clear that for calculation of interest under Section 234C, the tax deductible has to be considered. Hence, in our opinion the tax deductible has to be considered instead of actual tax deducted for the purpose of interest u/s 234C.

D. Few Instances where 234B & 234C is not liable to be paid:

1. As evident from the provisions of Section 234B, every assessee who is liable to pay advance tax has paid less than 90% of assessed tax is required to pay interest under Section 234B. However, there are certain instances where interest is not required to be paid even that 90% of assessed tax was not paid by assessee.

2. The pre requisite for levy interest under Section 234B, 234C are "Assessee should liable to pay Advance Tax under Section 208 of Act". Hence, it is clear that the provisions of 234B, 234C shall come into play only when the assessee fits into the ambit of Section 208 of Act. (Jt. CIT v. Rolta India Ltd. [2011] (SC))

3. Hence, in a case where the assessee is not falling under the ambit of Section 208 i.e., not liable to pay Advance Tax, then in-spite of failing to pay 90% of assessed tax or there is a deferment in installments paid, assessee is not liable for interest u/s 234B, 234C.

Few examples of such Privileged Assessee:

a) An individual resident in India, who does not have any income chargeable under the head "Profits and gains of business or profession"; and is of the age of 60 years or more at any time during the previous year;
b) Assessee whose tax payable as mentioned in section 208 of Act is less than Rs 10,000/-;
c) Assessee covered under section 44AD (but not assessee u/s 44AE);
d) I. Assessee whose total income comprises of Salary income from which tax at source is to be deducted (DIT v. Maersk Co. Ltd. [2011]) and
   II. Non Resident Assessee whose income is subject to tax deduction at source (DIT v. Jacabs Civil Incorporated/Mitsubishi Corporation [2010])

- for both these cases irrespective of fact that the TDS was deducted or not assessee not liable to pay interest u/s 234B,234C.

E. Amendments made in Finance Act,2015

In sec.234B

1. sub-section (2A) is inserted to provide that, where an application u/s. 245C (1) for any assessment year has been made, Assessee shall be liable to pay simple interest at the rate of 1% for every month or part of a month comprised in the period commencing on the 1st day of April of such assessment year and ending on the date of making such application, on the additional amount of income-tax referred to in that sub-section.

- Where as a result of an order of the Settlement Commission u/s. 245D (4) for any assessment year, the amount of total income disclosed in the application u/s.245C (1) is increased, the assessee shall be liable to pay simple interest at the rate of 1% for every month or part of a month comprised in the period commencing on the 1st day of April of such assessment year and ending on the date of such order, on the amount by which the tax on the total income determined on the basis of such order exceeds the tax on the total income disclosed in the application filed u/s. 245C(1)

2. Sub-section (3) is inserted to provide that the period for which the interest is to be computed will begin from the 1st day of April next following the financial year and end on the date of determination of total income u/s. 147 or sec. 153A.

Conclusion: Apparently even though it seems to be similar factors for calculating the interest u/s 234B and 234C there are differences in factors that are to be taken for calculating referred interests such as Assessed Tax vs Tax on Returned Income, Tax Deducted vs Tax Deductible which will impact on outcome of interest amount.

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SERVICE TAX

SERVICE TAX MELANCHOLY ON EMPLOYER SERVICES TO EMPLOYEE

Contributed by CA Manindar & CA Sri Harsha

Introduction:

Services provided by employee to employer in the course of or in relation to his employment are excluded from the definition of 'Service' as given under Section 65B(44) of Finance Act, 1994. Hence no service tax is applicable on activities performed by employees to employers in course of employment. However the current article highlights the issues involved regarding applicability of service tax on any services extended by employer to employee in the course of or in relation to such employment. In corporate sector especially in IT Industry, it is the usual practice for the employer to extend a variety of services to employees. The following are widely provided such services.

(a) Canteen facility: This service includes supply of food at the work place for a concessional rate to employee.

(b) Access to sports/ gymnasium/cultural facilities: Many a times these services are provided at work place by employers without charging any amounts from employees as part of staff welfare. In such cases, no service is involved as there is no consideration. Sometimes these services are provided by charging nominal amounts from employee to recoup the maintenance costs of these facilities.

(c) Free transport facility: This service includes to and fro transportation of employees between work place and home.

(d) Concessional Loan/Finance Facilities: This service includes extending loans/finance at a concessional rate of interest.

(e) Notice Period Pay: Sometimes, employees are obligated to give prior notice say two months in advance for leaving the employment. In case the employee violates this condition, employer recovers/forfeits two months' salary and allows him to leave the employment. This is a kind of passive act involving employer agreeing to tolerate an act (breach of prior notice) for consideration (two months' salary).

With these insights on nature of services generally extended by employer to employee, let us proceed to examine the service tax implications on the said transactions.

Whether Employer Services to Employee Covered Under Section 65B(44):

The definition of 'Service' as provided under section 65B (44) is reproduced as under;

"service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-

(a) ----------

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) ----------

Upon plain reading of clause (b), by adopting literal interpretation, it appears that 'Service'definition excludes only a provision of service by an employee to the employer in the course of or in relation to his employment but not vice versa. This would mean that if any employer provides any services to employee for consideration, then the same constitutes service and is not excluded.

Draft Circular of CBEC Propagating the Above Interpretation:

The above stated interpretation is unofficially mooted by Revenue at the time of introduction of Negative list based taxation through a draft circular F.No. 354/127/2012-TRU dated July 27, 2012, which states that, activities carried out by employers to employees for consideration are taxable, unless specified in the Negative List or otherwise exempted. The taxability has been clarified by para 9 and para 10 which is reproduced as follows;

"9. One of the ingredients for the taxation is that such activity should be provided for consideration. Where the employees pays for such services or where the amount is deducted from the salary, there does not seem to be any doubt. However, in certain situations, such services may be provided against a portion of the salary foregone by the employee. Such activities will also be considered as having been made for a consideration and thus liable to tax...……..

10. However, any activity available to all the employees free of charge without any reduction from the emoluments shall not be considered as an activity for consideration and will thus remain outside the purview of the service tax liability (facilities like crèche, gymnasium or a health club which all employees may use without any charge or reduction from the salary will be outside the tax net)."

In view of the above clarification, it is very clear that the Revenue target is to tax any non-cash benefits/services extended by employer to employee factored as part of employee CTC (cost to company) at the time of appointing an employee. This would mean that even for extending a benefit/service, if no separate charge is made but the same is factored as part of CTC, then the same is said to have been provided for consideration (i.e. employee service) and the same is liable to service tax.

For example, benefits like free holiday travel facility, car for personal use, rent free accommodation are factored in CTC but no costs are recovered from employees. These facilities even if provided without any charges from employees, the same would be considered as provided for consideration (i.e. employment) and would be subject to service tax.

However any activity which is not part of non-cash benefits/services considered for CTC provided free of cost without charging anything from employee then the same will not be a service on the reason that there is no consideration involved. For example, employer allowing unrestricted access to gym facility at work place for all employees which is not even factored for the purpose of CTC. In such cases, it is treated as activity undertaken without consideration and the same shall not be liable to service tax.

The above draft circular was released at the time of introduction of Negative list based taxation in the year 2012 for public comments; but for reasons unknown the same is not yet released officially. Despite this, there is no bar for Revenue authorities to resort to such interpretation.

Recently, the DGCEI in its MO Circular has dealt with the issue regarding leviability of service tax on forfeiture of security deposits by employees. The recovery of an amount, in terms of forfeiture of security deposit or other payments, from employee for leaving the organization without giving stipulated notice or completing the bond period is a common phenomenon in business organizations. The DGCEI opined that the activity of forfeiture of a security deposit for short notice given by the employee is a taxable service as per the provisions of Section 66E (e) of the Finance Act, 1994, covered under the declared services of, "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to doan act". Thus, services by employer to employee like Notice period pay are chargeable to service tax from the standpoint of DGCEI.

Recent Contrary view of Advance Ruling Authority (AAR):

On the other contrary, the AAR in a recent case of JP Morgan Services India Private Limited, 2015-TIOL-12-ARA-ST has considered the applicability of service tax on employer services. In the said case, the applicant has given an option to employees to hire cars for their personal and official use. For this requirement, the applicant has taken vehicles on hire from a leasing company. The applicant has recovered from the employees the lease charges that are paid to leasing company. The applicability of service tax on the lease charges paid by employee to employer has been examined.

The AAR has interpreted the definition of 'Service' under Section 65B(44) to mean that provision of service of by an employee to an employer in the course of or in relation to his employment cannot be considered as service as the same is excluded from the definition of 'Service'. Once the activity of employment services to employer is excluded from 'Service' definition, the said definition cannot be applied for any non-monetary benefit extended by employer to employee in reciprocation to employee services.

In order to add strength to this interpretation, one can put forward the argument that an activity excluded from 'Service' definition is different from a service covered under Negative list or mega exemption notification and is outside the ambit of service tax in entirety i.e. even any activity undertaken in reciprocation to the said excluded employment service is also out of the ambit of service tax levy. However, in the humble opinion of the paper writers, the said judgment is not in detail to address the issue holistically from all possible corners.

Conclusion:

Going by plain language of 'Service' definition under Section 65B (44) and drawing support from draft circular, employer services to employee could be considered as liable to service tax. The contrary interpretation adopted by AAR created doubts over the service tax applicability thus making the issue further gloomier.

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FCRA

REGISTRATIONS & RETURNS UNDER FCRA

Contributed by CA Harsha & Vetted by CA Murali Krishna

The Foreign Contribution (Regulation) Act, 2010 (for brevity 'FC(R)A') has been introduced with an objective to regulate the acceptance and utilization of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit the acceptance and utilization of foreign contribution or foreign hospitality for activities detrimental to the national interest. FC(R)A is administered by Ministry of Home Affairs (for brevity 'MHA') under Government of India (for brevity 'GoI'). The FC(R)A has replaced the earlier Foreign Contribution (Regulation) Act, 1976 and is effective from 1st May, 2011

The recent amendments carried on to the FC(R)A clearly suggest that MHA is closely scrutinizing the receipts and utilization of foreign contributions particularly which are detrimental to national interest. Further, as per the information available on www.fcraonline.nic.in a total of 14,000 entities registration has been cancelled by MHA for violating the provisions of FC(R)A. Hence, in light of the tough regulations, it is very important for individuals, associations or companies who are in receipt of foreign contribution to be updated with the changes made to FC(R)A, more specifically areas pertaining to the registrations and filing of returns.

The aim of this article is to dwell upon the registration (initial and renewal) and filing requirements under FC(R)A so the trade can be abreast of the procedures.

Registration & Related Matters:

Section 11 to Section 16 of FC(R)A read with Rules made thereunder deals with registration and related matters under the Act.

Persons required to obtain registration under FC(R)A:

Every person having a definite cultural, economic, educational, religious or social programme shall not accept foreign contribution unless such person is registered with central government. The term 'person' is defined vide Section 2(m) of the Act which includes individual, association, Hindu undivided family and a company registered under Section 8 of the Companies Act, 2013 (Corresponding Section 25 of Companies Act, 1956). It is to be noted that the definition of 'person' is laid in an inclusive manner, which make the definition of 'person' wider in scope. Hence, apart from what is stated above as 'person' all other general meaning of 'person' shall be falling under the ambit of the Act.

Status of the registrations under Foreign Contribution (Regulation) Act, 1976:

It is known that till the FC(R)A, 2010 was enforced, the FC(R), 1976 was operative. Associations which have obtained registration under 1976 Act, will also be treated as registered under the 2010 Act and such registration shall be valid till 5 years from the date on which Section 11 was made effective. Hence, all persons who has obtained registration under the old act shall apply for renewal on or before 31.10.2015 (6 months prior to the lapse of registration in case of One year projects).

History of past operations for applying for registration:

FC(R)A has not specified any time limit for applying for registration under Section 11. Even the rules has not provided for the same. As per Q2 of FAQs hosted on the https://fcraonline.nic.in website, it is required that any person having existence for atleast three years can apply for registration under Section 11 despite of the fact that the law nowhere states the same.

Procedure for obtaining registration:

- Person intending to obtain registration shall make an online application vide Form FC-3 by filling all the required information;
- The applicant shall upload the singed or digitally signed application along with all the documents specified vide FC-3;
- The applicant shall pay a fee of Rs 2,000/- for obtaining registration under the Act.
- The applicant shall open an exclusive bank account for receipt and utilization of the foreign contribution.
- Though not specifically mentioned, it is also advisable to send a hard copy of the application and other related documents to the central government apart from the online application.

Grant of Certificate of Registration:

Section 12 of the Act deals with provisions relating to grant of the registration. The central government if it deems that the application for registration is not in conformity with the rules made thereunder, may reject the application. In case the application for grant of registrations is rejected for any reason, the applicant shall wait for six months from the date of rejection and apply freshly for registrations vide Form FC-3 and by complying with the rules made thereunder.

If the application is found to be good in all aspects, the central government after making such inquiry shall grant the certificate of registration within 90 days from the date of receipt of the application. If the central government fails to grant the registration within 90 days, it shall communicate the reasons to the applicant. Further, any person shall not be eligible for grant of certificate, if his certificate is suspended as on the date of making application. Also if there is any non-compliance of the provisions of FC(R)A, then such person is not eligible for grant of registration.

Validity of Certificate of Registration:

The certificate of registration is not a permanent one as it used to be under the 1976 Act. As per the 2010 Act, the certificate of registration is valid only for a period of 5 years from the date of its issue.

Renewal of Certificate of Registration:

The certificate of registration shall be renewed after the expiry of 5 years from the date of issue. Every person applying for such renewal has to make an application vide Form FC-3[1], six months before the date of expiry of certificate of registration. Every applicant has to pay a fee of Rs 500/- for renewal of certificate of registration.

If any person fails to renew his certificate of registration, the registration granted under Section 11 shall cease from the date of completion of 5 years and an application for fresh registration has to be made in terms of Section 11 read with Rule 9 of the FC(R)A Rules, 2011.

However, if the person can prove sufficient grounds that failure to renew the registration within stipulated time, the central government can accept such application but not later than 4 months from the date of expiry of the original registration.

The central government normally renews the certificate within 90 days from the date of receipt of application for renewal. If the central government does not renew within such time period, it shall communicate the reasons to the applicant. The central government is empowered to refuse the renewal application, if it thinks such person has violated the provisions of the act or rules. It is to be specifically understood that in case of not granting such registration within 90 days or there is no communication for rejection of the application, it cannot be deemed that the registrations is granted.

Further, the registrations for which renewal is sought on the ground that 5 years has been exhausted from the date of certificate of registration, the renewal date has been extended to 15.03.2016 in terms of F. No II 21022/23(76)/2015- FCRA III dated 14.12.2015.

Suspension of Certificate of Registration:

Section 13 deals with provisions relating to suspension of certificate of registration issued under Section 12 of the Act. The central government while considering cancellation of registration under Section 14, may after recording the reasons in writing, suspend the certificate of registration for a period not exceeding 180 days. The reasons for such suspension shall be issued by way of order in writing to the registration holder. However, a prior notice to registration holder regarding the suspension is not necessary.

A person whose certificate has been suspended shall not be eligible to receive foreign contribution during the said period of suspension. In cases of hardship, the central government may allow the receipt of foreign contribution subject to such terms and conditions.

Further, the person whose certificate has been suspended can only utilize only 25% of the unspent foreign contribution subject to prior permission from the central government on a plain paper. The remaining 75% of unspent money can only be spent post revocation of suspension order.

Cancellation of Certificate of Registration:

The central government may cancel the certificate of registration after making necessary inquiry and deems that any of the conditions mentioned under Section 14 are fit it to the case. However, the central government has to record its reasons in writing and grant an opportunity for hearing for the registration holder before the order for cancellation is made.

Any person whose certificate of registration is cancelled under Section 14 of the Act, cannot apply for registration or for grant of prior permission for a period of 3 years from the date of cancellation of certificate.

[1]Form FC-3 is substituted for Form FC-5 for renewal vide Foreign Contribution (Regulation) Amendment Rules, 2015, Notification No. GSR 966(E), dated 14.12.2015

Intimation to Central Government vide Returns:

Filing of Annual Returns:

Every person registered under Section 12 of the Act, shall intimate central government or such authority prescribed by central government, the amount of foreign contribution received by it, the source from which foreign contribution is received and the manner and purposes for which such foreign contribution has been utilized in a Form FC-4[2] in terms of Section 18 of the Act.

Documents and Forms to be filed with FC-4:

Rule 17 of the FC(R)A Rules prescribe the details to be furnished along with FC-4, which are detailed as under:

- Income and Expenditure Statement, Receipt and Payment Account and Balance sheet for the period starting from 1st April to 31st March of succeeding year.
- FC-4 should also reflect the foreign contribution received in the exclusive bank account and shall also include the details in respect of funds transferred to another bank accounts for utilization.
- If the foreign contribution relates to only articles, the intimation shall be submitted in Form FC-1;
- If the foreign contribution relates to only foreign securities, the intimation shall be submitted in Form FC-1;
- FC-4 or FC-1, as the case may be, shall be duly certified by a chartered accountant;
- FC-4 shall be accompanied by the bank statement of the exclusive account maintained, duly certified by an officer of such bank;
- The accounting statements referred above shall be preserved for a period of 6 years.
- If the person has not received any foreign contribution in such financial year, even then a Nil report has to be submitted. Further, if the person has not received or utilized any foreign contribution during a financial year, it shall not be required to obtain a certificate from chartered accountant or income and expenditure statement or receipt and payment account or balance sheet with FC-4.

Due Date for submission of FC-4:

FC-4 has to be submitted within 9 months from the closure of the financial year. That is to say, for the period 1st April, 2014 to 31st March, 2015, the Form FC-4 shall be filed by 31st December, 2015. Now FC-4 has to mandatorily filed electronically as per the procedure laid down.

However, due to launch of the new website https://fcraonline.nic.in which facilitates filing of the Form FC-4 online along with scanned copies of such details required, the due date has been extended from 31st December, 2015 to 15th March, 2016[3]. Hence, FC-4 for FY 14-15 can be filed till 15th March, 2016.

[2]Form FC-6 is replaced with Form FC-4 vide Foreign Contribution (Regulation) Amendment Rules, 2015, Notification No. GSR 966(E), dated 14.12.2015

[3]Vide F. No. II.20122/23(76)/2015-FCRA-III dated 22.12.2015

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INTERNAL AUDIT

DIGITAL SIGNATURE DECRYPTED – E LOCK

Contributed by CA Sandeep

What are digital signatures?

Digital Signatures are based on Public Key Technology that uses asymmetric cryptography. Each person's identity is related to a key pair - a private key and a public key. These keys are nothing but mathematical codes generated on your computer.

Overview

The arrival of digital signatures, and their legalization by Governments all over the world, has marked a new revolution in the world of electronic transactions. Digital Signatures will make business transactions over the Internet easier, and more reliable for businesses and consumers. Paper documents are steadily replaced by electronic documents and as other digital assets such as messages, transactions, digital content, and software proliferate across every type of organization, new types of controls are needed. Electronic versions of traditional signatures and watermarks provide some benefits but lack the security properties to play a role in compliance reporting and support legal challenges. As organizations adopt a more service oriented approach to business processes and integrate with cloud-based resources, they need provably reliable ways to validate the authenticity and integrity of these electronic items; more specifically, they need to attest that these items have not been changed maliciously since they were created. Furthermore, when it comes to digital transactions, organizations need to establish a means of non-repudiation—the ability to hold parties accountable for the transactions they execute. In the end, a legal contract executed online, for example, should be as ironclad as one executed in person before witnesses. To meet these goals, organizations use digital signatures.

In today's digital business environment, internal auditors have to assess the risk and security of large volumes of digitally originated transactions and documents. Among the many methods, protocols, and products for securing online transactions are digital signatures. Digital signatures improve efficiency, provide security around transactions, and enhance collective approvals in a fraction of the time compared to conventional ink signatures. Nonetheless, there is always the danger and fear of unauthorized or malicious use of digital signatures. Internal auditors and organizations need to assess the level of risk and to what extent the organization should secure its digital signature platform. Moreover, auditors should consider the trade-off between the level of risk digital signatures pose and the level of authentication required to provide desired levels of assurance while accepting them.

Mechanics of digital signature

Digital signatures use private/public keys and hash results of the original and destination documents. The digital representation or summary of the document unique to a message origin-hash result (OHR) is created by the hash function of the digital signature software. In turn, this software uses the signer's

private key to transform the hash result into a digital signature that is unique to the message. Upon receipt of the document, the transmitted message computes a new destination- hash result (DHR) by using the same hash function used to create the digital signature. Using the corresponding public key and DHR, the receiving computer confirms whether the affixed digital signature was created using the matching private key and whether both the OHR and DHR match. If both the keys and hash results are a match and confirmed, the validity of the message, signer, and receiver are verified.

Key risks Associated with Digital signatures

- Attackers can create fake signatures or misuse authorised signatures if the digital signing process is not secure thereby can bring the system and potentially the organization into disrepute.

- Failure to maintain adequate documentation and certification for policies and practices associated with digital signing and key management could result in signatures failing to be accepted in any jurisdiction, thereby negating their value to the organization.

- Some digital signing processes can be computationally intensive, slowing down business processes and limiting their ability to scale.

Evidence of Genuineness

A digital signature is an electronic sound, symbol, or process attached to or logically associated with a record and executed by a person with the intent to sign the record. In layman's terms, it is a person's electronic expression of agreement to the terms of a particular document with the intent to sign. A scanned or photographed image of a written signature does not constitute a digital signature, as it is analogous to affixing a rubber stamp of the signature that can be duplicated or misused without the signer's knowledge. Instead, digital signatures provide a secure encryption environment for the data associated with a signed document and verify the authenticity of a signed record.

To authorize transactions, digital signatures use a combination of content capture, method of signing, data, and user authentication. They use electronic authentication to establish confidence in user identities that are electronically presented to an information system. Individual authentication is the process of establishing an accepted level of confidence and assurance for an accepted level of risk. There is a direct relationship between the associated risk and the complexity of authentication needed to provide a higher degree of assurance in the use of digital signatures. Higher levels of assurance need complex, multi factor authentication methods that, in turn, require a secure IT infrastructure and user training. This correlation poses a trade-off challenge to auditors and organizations willing to accept digital signatures, thereby compelling them to identify those business processes that require an optimum level of authentication to offset risks.

Digital signatures are built on an encryption/decryption technology thati) collects evidence of the document such as metadata and IP address, ii) verifies the identity of a signer and receiver, and iii) provides an audit trail of the transactions. This technology uses a public key infrastructure (PKI) in which

the signer uses his or her private key to encrypt the document and the recipient uses the corresponding public key to decrypt it. A digital signature requires a signer to establish a certificate-based digital ID, commonly enclosed in a token, smart card, or other physical device, to provide a high level of authentication, integrity, and security to the transaction and the identity of the parties signing. The executor or signer is presumed to be legally responsible for any document signed with a private key.
The important consideration when assessing the risk for digital sig- natures is their provisioning through e-mail communications, which makes Internet security critical. If the e-mail platform is compromised, the digital signature and PKI lose their authenticity and validity.

The risk assurance trade off

"Digital Signature Risk to Authentication" model has been developed which provides a semi-quantitative approach to assess the associated risk for any level of authentication used to provide digital signature. The risk tolerance level of authentication may vary with the nature of the business process. For example, financial transactions, approvals, or decisions generally have a higher degree of risk, based on their monetary value, than administrative functions such as leave requests.

The digital signature risk-to- authentication is a framework for internal auditors to establish the desired level of trust for an electronic transaction, as well as the authenticity, integrity, and reliability of such transactions. This can be accomplished through a quantitative risk assessment for each transaction specific to a functional unit by estimating the risk and the likelihood of occurrence. Use of the SRA model can give internal auditors an understanding of internal controls and security needed when their organization implements digital signatures.

The SRA model provides a semi- quantitative approach to assessing the risk associated with a given level of authentication used to provide a digital signature. As a general rule, the higher the level of authentication, the lower the likelihood that an incident, or breach, will occur and the lower the risk. Although the nature of the risk versus authentication curve may be different for different business processes, the pattern will tend to follow the path of reduced risks for higher authentication. Internal auditors or management can develop a risk chart based on the formula: Risk ® or Management Risk ®Likelihood of occurrence of event (L) x Magnitude (M). To illustrate the formula, assume that one in 30 email accounts are hacked. Based on this assumption, the risk can be calculated by assessing the monetary magnitude of the effect of hacked emails on an organization. The trade-off zone depicted in the chart provides an opportunity window to secure the digital signature environment to achieve the desired level of assurance, thereby enabling organizations to identify those processes that require optimum levels of authentication to offset risks.

The key factor to consider in implementing digital signatures is to identify the level of risk tolerance and the associated risk for a business process. Institutional risks may involve financial, brand-value reputation, and other key administrative communication. Based on the various types of business processes and the level of severity, the assurance levels — which are a combination of authentication and validation — as well as the trust levels must be established by the appropriate business unit man-agement. To secure an electronically signed document as evidence, auditors should consider the risks

associated with the signing process and with the significance of the information. Security must be approached with the objective of managing potential risks and should be weighed against the level of authentication needed to achieve the desired level of risk tolerance.

Internal auditors can use this model to assess the risk/assurance needed for digital signatures. Because systems are imperfect, auditors should consider the reliability of the information obtained through the digital sig- nature validation process. For example, they should consider whether digital signatures can enhance internal control over online sales orders by authenticating the validity of customers.

Digital assurance

As the Internet is an essential tool for transmitting digital signatures, it is necessary to have a secure transmission process that ensures a document signed through a digital signature is not tampered with by a third person and reaches the recipient in the form in which it left the signatory. Organizations also need to determine which business processes are not appropriate for digital signatures, such as creating wills, testamentary results, and certain types of contracts. Internal auditors and their organizations need to identify the various processes for which they plan to use digital signatures, as well as perform a comprehensive risk assessment of those processes. The digital signature risk to authentication model can help auditors assess the level of authentication suggested for a specific business process to ensure it provides the desired level of assurance

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LABOUR LAWS

RESTRAINTS ON TERMINATION OF EMPLOYMENT

Contributed by SV Ramachandra Rao | Resource Inputs Limited

Employment relations in India are governed by Labour Laws such as Industrial Disputes Act, Industrial Employment (Standing Orders) Act, Trade Union Act and also Constitution of India and collective and individual contracts and judicial precedents. Most of the labour and employment laws primarily apply to 'workman' as defined in the Industrial Disputes Act. There are around 165 Labour Legislations in India of which 55 central legislations while 110 are state enacted legislations. Employees who are not workman as per the definition of workman in the Industrial Disputes Act, the employer-employee relations are governed by contract of employment. Generally a written contract with an employee is in the form of letter of appointment. These employees are governed by The Indian Contract Act 1872 and Specific Relief Act.

The Labour Laws with a view to protect the employment and prevent exploitation brought-in certain restrictions under some circumstances in different Labour Laws besides defining the procedures in dealing with acts of misconducts, if any, committed by the workmen. The Model Standing Orders have defined the acts which constitute misconduct and the punishments that can be imposed upon workmen on finding him guilty by following the defined procedure. The Industrial Disputes Act has imposed restrictions even after following the procedures laid down in Standing Order under certain special circumstances and protected workmen.

In this paper an attempt is made to analyze the provision under Employee State Insurance Act, Maternity Benefit Act and Industrial Disputes Act with regard to the restrictions imposed on the employer on dismissal or discharge of a workman.

ESI Act

The employees with gross monthly wage of Rs. 15,000/- and below, working in factories (other than seasonal factories) and shops and establishments with ten or more employees in the notified areas are covered under Employee State Insurance Act. The educational institutions, hospitals and construction workers are also covered under the Act. Employees who are not covered under ESI Act are covered under Employee Compensation Act and Maternity Benefit Act. Some of the benefits provided under the ESI Act are 'Sickness Benefit' 'Maternity Benefit' and 'Disablement benefit'.

In accordance with the Section 73 of the ESI Act employer shall not dismiss, discharge or reduce or otherwise punish an employee during the period when he / she is in receipt of sickness benefit or maternity benefit and also during the period in receipt of disablement benefit for temporary disablement or is under medical treatment for sickness or is absent from work as a result of certified illness arising out of pregnancy or confinement. During the said period no notice of dismissal or discharge or reduction shall be served on an employee. Thus there is statutory embargo on the employer not to dismiss or punish an employee during the period of above mentioned circumstances.

The Bombay High Court in the matter of Divisional Controller, Maharastra State RTC Vs SherkhanChhotekhan [2004 LLR 600] held that the dismissal of an employee, as covered under the ESI Act during receipt of his sickness benefit, would be void and the employee will be entitled to reinstatement with other benefits.

The Bombay HC in the matter of RamchandraSitaramKale(deceased) Vs Maharashra State Road Transport Corporation [2009 (120) FLR 100] held that in case where a notice of dismissal or discharge or reduction is given during the specified period of illness, the same shall remain in abeyance because the same is not valid nor the same can be made operative during that period.

The Karnataka High Court in the matter between Guest Keen Williams Ltd Vs PO Labour Court held that the bar in section 73 of the Act only requires the employer not to dismiss or terminate during the period of sickness benefit period. However, in the case of voluntary abandonment, this will not be applicable.

If any employer contravenes the section 73, it would not only render the dismissal or discharge invalid but also expose the management itself to the peril of prosecution under section 85 of the Act.

The Kerala High Court in the matter of Kerala State Co-Operative Coir Marketing Federation Limited VsSreekumar [2002, III LLJ 101] examined the question whether the ESI Court is competent to consider the validity of an order of dismissal of an employee on the ground of violation of section 73 and held that the ESI Court is not competent and it can only take penal action against the employer, if proved, violation of section 73.

The workmen has to take up his claim for reinstatement only under Industrial Disputes Act and not under ESI Act.

Maternity Benefit Act

In accordance with the section 12 of Maternity Benefit Act no employer shall dismiss or discharge a women employee who is absent from duties under the provisions of this act and also any time during pregnancy. Women employee will be entitled to maternity benefit under Act on working a minimum of 80 days in the twelve months preceding the date of expected delivery. Women employees engaged directly or through any agency or contractor is also covered under the Act.

The Supreme Court in the matter of Municipal Corporation of Delhi Vs Female Workers (Muster Roll) [AIR 2000 SC 1274] held that the provisions of the Maternity Benefit Act entitle maternity leave even to women engaged on casual basis or on muster roll basis on daily wages and not only those in regular employment.

Supreme Court in the matter of NeeraMathurVs LIC of India ruled in favour of the pregnant employees. In the instant case the employee while on probation she applied for maternity leave and the company discharged her from service on reasons of deliberately withheld the fact of being pregnant at the time of filling up a declaration form prior to being appointed. The court ordered reinstatement.

Industrial Disputes Act

Section 33 of the Industrial Disputes Act imposes restrictions and a temporary ban on the employer's right to alter the conditions of service of a workman or to punish him by way of discharge or dismissal while an industrial dispute is pending before conciliation authority or Labour Court or Industrial Tribunal or Arbitration. The employer has a responsibility to seek prior approval of the authority before whom the disputes is pending for effecting any change in conditions of service or

for discharging or dismissing the workman in respect of any matter or misconduct that is connected with the dispute u/s. 33(1) and in case of misconduct not connected with the dispute, the employer can pass an order of discharge ordismissal, but he should seek approval subsequently u/s. 33(2)(b) and also make payment of wages for one month.

Thus for imposing a penalty of dismissal or discharge on a workmen for his acts of misconduct which is not connected with the dispute pending before the authority after conducting enquiry and establishing the misconduct in according with the Standing Orders of the industrial establishment, the employer is required to make an application for approval after passing the orders under Sec 33(2)(b) of the Act which is a major constraint to the employer in addition to payment of one month wages to a workmen who has committed misconduct.

The employer is required to do all the three acts simultaneously, that is the discharge or dismissal of the workman, making payment of one month wages and making application for approval for discharge or dismissal of the workman. The Supreme Court in the matter of Straw Board Manufacturing Co Ltd VsGobind, [1962 I LLJ 420] held that employer shall ensure that all the three actions shall be simultaneous and shall form part of the same transaction failing which the application runs the risk of being rejected.

The Supreme Court in the matter of Tata Steel VsModak [1966 AIR 380] and Jaipur ZillaSahakariBhoomiVikas Bank Ltd Vs. Ram Gopal Sharma [2002 (92) FLR 667] held that in case of misconduct not connected with a pending dispute u/s 33(2), the employer may first discharge or dismiss the workman after domestic enquiry and then can seek approval of the concerned industrial court. If the approval is granted, the discharge or dismissal shall take effect from the date of the order. In case of refusal of approval application, then the workman is deemed to be in continuous service.

However the jurisdiction of the Tribunal on the application made for approval after dismissal or discharge of a workmen for a misconduct not connected with the dispute before it is limited to:

(a) Whether a proper domestic enquiry was conducted in accordance with the Standing Orders by observing the principles of natural justice.

(b) Whether a prima facie case for dismissal based on the evidence on record is made out

(c) Whether the employer had arrived at bona fide conclusion that the workman was guilty of the misconduct.

(d) Whether the dismissal or discharge was not intended to victimize the workman.

and the Tribunal does not sit as a Court of Appeal re-appreciating the evidence and it only examine the proceedings and finding of the enquiry to ascertain whether prima facie case had been made out or not. In the matter of discharge or dismissal connected with the dispute pending before the Tribunal or in the Conciliation proceedings, the Supreme Court in the matter of Lord Krishna Textile Mills Vs its workmen [1961 AIR 860] held that in case of misconduct connected with pending dispute, u/s 33(1), the discharge or dismissal shall take effect only on the approval granted by the concerned Industrial Court. The Supreme Court in the matter of Ram LakhanVs Presiding Officer [2001(I) LLJ 449] also held that during the pendency of management's application for permission to dismiss the workman, the company shall pay the subsistence allowance if placed under suspension.

The Act imposed restrictions on discharge or dismissal of a protected workman during pendency of an industrial dispute. The Karnataka High Court in the matter of Bagalkot Cement Co Vs The Management of Kanoria Industrial Ltd [2006 LLR 674] held that dismissal of protected workman, without seeking permission will be violation of section 33(3) of the ID Act.

All the registered trade union office bearers will not become protected workmen automatically. Only such of those office bearers whose names have been notified by the registered trade union on or before 30th April every year and approved by the Management will alone fall under the category of protected workman. The total number of protected workman shall be restricted to one percent of the total number of workman subject to a minimum of five and maximum of one hundred. If the number of registered trade unions are more than one, the protected workman shall be based on the membership of the each registered trade union. The period of recognition of the workman as a protected workman will be valid for twelve months only.

Thus it is essential to the employers to understand the restrictions imposed on discharge or dismissal by different legislations under certain special circumstances before taking a decision even in disciplinary matters.

This article is contributed by SV Ramachandra Rao. The author can be reached at svrr@resourceinputs.com

TRANSFER PRICING

COUNTRY BY COUNTRY REPORTING – ACTION 13 – BEPS PROJECT

Contributed by CA Mithilesh

Action 13 of the action plan on base erosion and profit shifting (BEPS action plan, OECD, 2013) requires the development of "rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that MNEs provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template".

In response to this requirement, a three-tiered standardised approach to transfer pricing documentation has been developed.

First, the guidance on transfer pricing documentation requires multinational enterprises (mne's) to provide tax administrations with high-level information regarding their global business operations and transfer pricing policies in a "master file" that is to be available to all relevant tax administrations. A brief checklist of info to be filed/maintained is provided in the later part of the article.

Second, it requires that detailed transactional transfer pricing documentation be provided in a "local file" specific to each country, identifying material related party transactions, the amounts involved in those transactions, and the company's analysis of the transfer pricing determinations they have made with regard to those transactions. Local files are basically the TP documentations maintained as per the local tax laws (rule 10D currently in India)

Third, large mne's are required to file a country-by-country report that will provide annually and for each tax jurisdiction in which they do business the amount of revenue, profit before income tax and income tax paid and accrued. It also requires mne's to report their number of employees, stated capital, retained earnings and tangible assets in each tax jurisdiction. Finally, it requires mne's to identify each entity within the group doing business in a particular tax jurisdiction and to provide an indication of the business activities each entity engages in. This is basically presenting and populating the data in the following tables:

Table 1:

Tax Jurisdiction	Revenues			Profit (loss) before income tax	Cash Tax Paid (CIT and WHT)	Current year tax accrual	Stated capital	Accumulated earnings	Tangible assets other than cash and cash equivalents	Number of employees
	Unrelated party	Related party	Total							
1.										
2.										
3.										
4.										
5.										

Table 2:

Tax Jurisdiction	Constituent entities resident in the tax jurisdiction	Tax jurisdiction of organization or incorporation if different from tax jurisdiction of residence	Main business activity(ies)												
			R & D	Holding or managing IP	Purchasing or procurement	Mfg or production	Sales, marketing or distri.	Admin., Mgmt or support services	Provision of services to unrelated parties	Internal group finance	Regulated financial services	Insurance	Holding shares or other equity instruments	Dormant	Other
	1.														
	2.														
	3.														
	1.														
	2.														

Taken together, these three documents (master file, local file and country-by-country report) will require taxpayers to articulate consistent transfer pricing positions and will provide tax administrations with useful information to assess transfer pricing risks, make determinations about where audit resources can most effectively be deployed, and, in the event audits are called for, provide information to commence and target audit enquiries. This information should make it easier for tax administrations to identify whether companies have engaged in transfer pricing and other practices that have the effect of artificially shifting substantial amounts of income into tax-advantaged environments.

Countries participating in the BEPS project agree that these new reporting provisions, and the transparency they will encourage, will contribute to the objective of understanding, controlling, and tackling BEPS behaviours.

The specific content of the various documents reflects an effort to balance tax administration information needs, concerns about inappropriate use of the information, and the compliance costs and burdens imposed on business. Some countries would strike that balance in a different way by requiring reporting in the country-by-country report of additional transactional data (beyond that available in the master file and local file for transactions of entities operating in their jurisdictions) regarding related party interest payments, royalty payments and especially related party service fees. Countries expressing this view are primarily those from emerging markets (argentina, brazil, people's republic of china, colombia, india, mexico, south africa, and turkey) who state they need such information to perform risk assessment and who find it challenging to obtain information on the global operations of an mne group headquartered elsewhere. Other countries expressed support for the way in which the balance has been struck in this document. Taking all these views into account, it is mandated that countries participating in the BEPS project will carefully review the implementation of these new standards and will reassess no later than the end of 2020 whether modifications to the content of these reports should be made to require reporting of additional or different data.

Consistent and effective implementation of the transfer pricing documentation standards and in particular of the country-by-country report is essential. Therefore, countries participating in the OECD/G20 BEPS project agreed on the core elements of the implementation of transfer pricing documentation and country-by-country reporting. This agreement calls for the master file and the local file to be delivered by mne's directly to local tax administrations. Country-by-country reports should be

filed in the jurisdiction of tax residence of the ultimate parent entity and shared between jurisdictions through automatic exchange of information, pursuant to government-to-government mechanisms such as the multilateral convention on mutual administrative assistance in tax matters, bilateral tax treaties or tax information exchange agreements (TIEAs). In limited circumstances, secondary mechanisms, including local filing can be used as a backup.

Threshold limit for applicability: These new country-by-country reporting requirements are to be implemented for fiscal years beginning on or after 1 january 2016 and apply, subject to the 2020 review, to mnes with annual consolidated group revenue equal to or exceeding euro 750 million. It is acknowledged that some jurisdictions may need time to follow their particular domestic legislative process in order to make necessary adjustments to the law.

In order to facilitate the implementation of the new reporting standards, an implementation package has been developed consisting of model legislation which could be used by countries to require mnc groups to file the country-by-country report and competent authority agreements that are to be used to facilitate implementation of the exchange of those reports among tax administrations. As a next step, it is intended that an xml schema and a related user guide will be developed with a view to accommodating the electronic exchange of country-by-country reports.

It is recognised that the need for more effective dispute resolution may increase as a result of the enhanced risk assessment capability following the adoption and implementation of a country-by-country reporting requirement. This need has been addressed when designing government-to-government mechanisms to be used to facilitate the automatic exchange of country-by-country reports.

Jurisdictions endeavour to introduce, as necessary, domestic legislation in a timely manner. They are also encouraged to expand the coverage of their international agreements for exchange of information. Mechanisms will be developed to monitor jurisdictions' compliance with their commitments and to monitor the effectiveness of the filing and dissemination mechanisms. The outcomes of this monitoring will be taken into consideration in the 2020 review.

Changes expected in Budget 2016:

The Indian government in the upcoming budget in February end would be announcing the changes in the Indian TP regulations to be on par with the global updates in realtion to the BEPS project and CBCR reporting. The Indian counterparts of the global MNE's should be maintaining the TP documentations (local files) in line with the global reporting's as part of the CBCR or global TP documentations to avoid inconsistencies. With growing transparency and exchange of information's it would be a very interesting period to see as to how the litigation statistics would respond.

Some Basic Questions to ponder upon:

1. *When is the first year companies will be expected to file?*

   The latest action 13 report suggests that countries participating in the OECDBEPS project will require groups to file in 2017 in respect of FY16 results.

2. *What will happen if the ultimate parent company is located in a country which has not implemented CBC reporting?*

   The OECD agreement builds in a response for situations where a company's parent jurisdiction does not implement (e.g., the parent is in the Cayman Islands), which is direct filing by the company in every country or possibly the substitution of a lower tier entity to serve as the parent for CBC collection and exchange purposes.

3. *What does the OECD mean by the term multinational group? Is it true that companies will not need to file if they are part of a privately owned group?*

   Action 13 refers to multinational enterprises (mnes) though it does not define mnes. Guidelines for multinational enterprises OECD2011 gives the following description:

   "a precise definition of multinational enterprises is not required for the purposes of the guidelines. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed"

   The latest implementation guidance provides that smaller and medium size enterprises (smes) with annual consolidated revenue of less than€750 million in the preceding year will not be required to file a CBC report. It states that no special industry exemptions should be provided, no general exemption for investment funds should be provided, and no exemption for non-corporate entities or non-public corporate entities should be provided.

   Accordingly, unless a group falls within the sme definitionall groups holding overseas operations that form part of their consolidation will need to file, regardless of ownership structure.

4. *Who is the reporting mne? In a large multinational group, it is possible that consolidated accounts are prepared for financial investors at more than one level? For example, group Bis a 65% subsidiary of company A with the remaining 35% of shares being publically held and prepares consolidated financial statements.*

   Action 13 states that: "a reporting mne is the ultimate parent entity of an mne group.". In the case outlined above, in our view, only company A would have to submit the CBC report. The notes on the master file suggest that it would be possible to present the data on a divisional basis where for instance the business divisions operate independently. This courtesy does not seem to be extended to CBC reporting. However, if it would aid understanding and follow up, it might make sense to file addendum CBC reports broken down on divisional lines.

5. *What do companies need to consider in terms of preparing for real CBC reporting and master file/ local file?*

   Simply giving the OECD list of data points to internal audit and asking them to confirm that they can provide the data is likely to result in a rather mechanical result without the tax impact being considered. This is really something that should be done in cooperation between tax and accounting people.

   Companies should consider whether they can get all the information e.g., independent subcontractors, or how they would be translating their figures from local to group currency in case they would report on local GAAP..

   Consistency should be kept in mind here both in terms of consistency between the CBC report, master file and local file and also that the underlying TP documentation is consistent to "the message" in the CBC report delivered to the tax authorities. The outcome of a risk assessment analysis performed by the tax authorities based on the CBC report might be linked to other actions or information (hybrids/exchange of information - rulings etc).

6. *Confidentiality?*

   Action 13 requires tax authorities to ensure confidentiality of the report be maintained. However, mnes should prepare that certain aspects could become public. In certain countries, there is political agitation to make the documentation public. In the UK, both the labour and conservative party manifestos open the possibility of making the information public. The likelihood is high that questions from tax authorities and ensuing controversy will get media attention.

Master File Details:

Organization structure	Business description	Intangibles	Intercompany financial activities	Financial and tax positions
Structure chart:	Important drivers of business profit	Overall strategy description	Financing arrangements for the group	Annual consolidated financial statements
▶ Legal ownership ▶ Geographic location	Supply chain of: ? 5largest products/ services by turnover ? Products/services generating more than 5% of turnover	List of important intangibles and legal owners	Identification of financing entities	description of existing unilateral Advance Pricing agreements (APAs) and other tax rulings
	Main geographic markets of above products	List of important intangible agreements	Details of financial transfer pricing policies	
	List and brief description of important service arrangements	R&D and intangible transfer pricing policies		
	Functional analysis of principal contributions to value creation by individual entities	Details of important transfers		
	Business restructuring/ acquisitions/ divestitures during fiscal year			

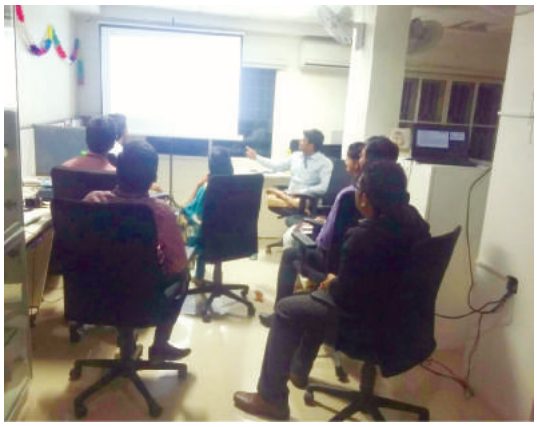
TECHNICAL SESSIONS:

S.No.	Event	Date	Speaker	Venue
1	Basics of Foreign Trade Policy	05/02/2016	CA Sri Harsha	SBS - Hyd
2	Full Day Seminar on "Issues and updates in Real Estate and Construction Industry"	19/02/2016	—	SBS - Hyd
3	Incisive Analysis of Exemptions under Service Tax - Part 2	26/02/2016	CA Manindar	SBS - Hyd
4	Unlocking the Financial Statements with Ratio Analysis	04/03/2016	CA Rajesh	SBS - Hyd

Note:

The timings for the above events shall be from 17:30 hrs to 19:30 hrs. We request the recipients of "SBS Wiki" who are interested to attend the above events to send confirmation of your participation 2 days in advance to make appropriate arrangements and sharing of the relevant material, if any.

Changing professional oppurtunities - What MNCs are expecting - CA Murali Krishna G



Incisive Analysis of Exemptions under Service Tax - CA Manindar

Data Modelling with MS Excel - Power Pivot - CA Saran Kumar U

Workshop on Applicability of Tools in Forensic Audit at Service Tax Commissionerate, Chennai - CA Saran Kumar U

Seminar on FEMA - Online filing through EBIZ Portal - CA Murali Krishna G

RECENT ISSUES & UPDATES IN REAL ESTATE & CONSTRUCTION INDUSTRY

Date: 19th February, 2016.
Venue: Hotel Minerva, Somajiguda, Hyderabad.
Timings: 09:45 to 17:15
Fee: Rs 1,000/- (incl. of Service Tax)

S No.	Topic	Speaker	Timing
1	Registration	-	09:45 – 10:00
2	Opening Remarks	CA Suresh Babu	10:00 – 10:10
3	Recent Trends	CA Rajesh	10:10 – 10:30
4	FEMA and Companies Act	CA Murali Krishna and CS Phanindra	10:30 – 11:30
5	Tea Break	-	11:30 – 11:45
6	Labour Laws	Sri S V Ramachandra Rao	11:45 – 12:45
7	Lunch	-	12:45 – 13:45
8	Service Tax and VAT	CA Sri Harsha and CA Ram Kumar	13:45 – 15:15
9	Tea Break	-	15:15 – 15:30
10	Direct Taxes	CA Suresh Babu and CA Ram Prasad	15:30 – 16:30
11	Panel Discussion	-	16:30 – 17:00
12	Closing Remarks	CA Saran Kumar	17:00 – 17:15

Register before 15th Feb 2016 for Early Bird fees Rs.800/- www.sbsandco.com/6h-reg

Our Offices:
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Nellore: 16-6-259, 1st Floor, Near Santi Sweets Opp: SBI ATM, Vijayamahal Centre, SPSR Nellore, Andhra Pradesh
Tada: 8-3-425/2, Flat No. 202, 2nd Floor, Bigsun Avenue, Near SRICITY, TADA, SPSR Nellore Dist, Andhra Pradesh
Visakhapatnam: 39-20-40/6, Flat No.7, Sai Yasoda Apartments, Madhavadhara, Visakhapatnam, Andhra Pradesh
Bengaluru: B104,RIRCO, Santosh Apartments, Wind Tunnel Road, Murugeshpalaya, Old Airport Road, Bangalore, Karnataka

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