IFA News Letter
India Branch - Western Chapter

Volume No 1 / 3 - October - December 2012

Chairman Speaks

It is indeed an interesting time - and a time of great twists & turns - in the International Tax arena. While the pace of developments continues unabated we have of late seen a series of pleasant developments restoring some balance and hopefully helping restore confidence of investors doing business in India. The Draft Report of the Expert Committee on GAAR & also the recommendations of the Expert Committee on Indirect Transfer bring a breath of fresh air. Both of these are commendable pieces of work both in terms of the content and also the speed with which the Expert Committee has been able to deal with the subjects.

The 2012 IFA Congress in Boston was a huge success with over 2000 delegates attending the Congress. Around 50 delegates from India, including tax professionals & senior revenue officials, attended the Congress. It was a matter of great pride to see Mr. Porus Kaka chair the first plenary on Subject 1, and also to see Mr. Mukesh Butani, Mr. Nishit Desai & Mrs. Shefali Goradia as Panelists on diverse subjects at the Congress. Mr. Porus Kaka was unanimously elected the next President and will take charge at the end of the 2013 Copenhagen Congress.

As we continue our journey in these interesting times we welcome any thoughts or suggestions you may have to carry IFA to still greater heights.

Editor Speaks

Sad was I to leave the venue of the 66th Congress of the International Fiscal Association (IFA) on the 4th October 2012 at Boston. The sheer numbers of attendees from world over including India astonished me. Over the years the growing numbers of Participants also defined the importance of the International Taxation needless to take a closer look at the Subjects discussed and the outstanding Presentations at the Congress. A unique gathering of the Tax Gatherers and the Tax Professionals is worth its watch.

Other than the Annual Congress there are smaller joint meetings of the Member Countries between the two Annual Congresses which give us the flavour of the larger Annual Congress. The limitation being only two country specific issues are mainly discussed among any other interesting international events/decisions.

At our end it is yet another effort to bring you the happenings in the field of International Taxation which will be of use in our practice in India and an over view to the outside world of the Judicial pronouncements in India. These are achieved by the Members who put in their efforts to bring out this News Letter.

My sincere thanks to the Members of the Board for their efforts.

Tara Rao
Editor

Inside this Issue

Courts Speak

I. Indian Rulings

Pratikshit Misra
Chartered Accountant

1. *CMA CGM Agencies (India) Pvt Ltd (Rajokot ITAT[1])*

Companies engaged in regular shipping business would not be within the ambit of section 172 of the Income Tax Act, 1961 ('Act'). Accordingly, the income would be taxable u/s 44B read with the relevant Article of the applicable Tax Treaty

The Assessee was an agent of a French company engaged in the business of goods transportation by sea. The Assessee filed voyage returns for its principal under section 172(3) of the Income Tax Act, 1961 ('Act') in respect of 40 voyages arriving at Mundra Port and a composite order under section 172(4) was passed by the Assessing Officer ('AO'). The AO denied the India – French tax treaty benefits to the principal by holding that the principal was a slot charterer and not an owner / charterer of the ship. The Commissioner of Income Tax (Appeals) held that the order u/s 172(4) was void since (i) the principal was engaged in regular and not occasional shipping business; (ii) the principal had filed its return of income u/s 139(1) as allowed under section 172(7) of the Act; (iii) section 172 can only apply to the owner / charterer of the ship.

On facts, the ITAT held that having regard to the multitude of voyages undertaken, the principal is engaged in regular shipping business and hence outside the ambit of section 172 of the Act. The ITAT further held that once a return u/s 139 is filed, his assessment would need to be completed under the normal provisions of the Act and not u/s 172.

2. *eBay International AG (Mum ITAT[2])*

Income from providing an online platform for buyers and sellers to come together should not constitute fees for technical services since the same is in the nature of provision of a standard facility. Further, Indian group companies providing marketing and other administrative support need not constitute Permanent Establishment of the foreign company in India.

The Assessee is a tax resident of Switzerland and had two group companies in India ('Indian Cos'). The Assessee operated Indian specific websites which act as an online platform for potential buyers and sellers to come together. The Assessee received consideration from the potential sellers. The Indian Cos *inter alia* (i) acted as collection agents; (ii) market surveyors; (iii) advisors on Indian legal requirements for the Assessee.

On facts, the Tribunal held that the Assessee did not provide any technical or consultancy services to the potential sellers.

On facts, the Tribunal held that the Indian Cos were dependent on the Assessee since their revenue streams only came from the Assessee. However, the Indian Cos did not *inter alia* (i) have the authority to conclude contracts on behalf of the Assessee; or (ii) directly or indirectly control the website of the Assessee. Accordingly, the Indian Cos did not constitute PE of the Assessee. Furthermore, the premises of the Indian Cos did not constitute place of management of the Assessee in India since the Indian Cos did not play a role in the maintenance or operation of the websites.

3. *John Wyeth & Brother Limited (Mum ITAT[3])*

The deduction to a Brach Office for allocated laboratory costs incurred by the Head Office should not be subject to the limits prescribed u/s 44C of the Act since the same are not administrative or executive in nature

The Assessee was a branch of a UK company. The assessee claimed a deduction of the laboratory expenses allocated to it from the total expenditure incurred by the UK company outside India. The AO held that the deduction of the laboratory expenses would be restricted to the umbrella of expense allocation permitted under section 44C of the Act since the same were general administrative and executive in nature. The Assessee disputed the applicability of section 44C of the Act to the said claim of laboratory expenses.

On facts and based on the various documentary evidence filed by the Assessee, the ITAT held that the (i) laboratory expenses allocated to the Indian Branch on a reasonable basis should not be covered within the ambit of section 44C of the Act; (ii) should be allowed in full; and (iii) be exclusive of other administrative and executive expenses claimed by the Assessee.

[1] TS-669-ITAT-2012 (Rajkot)
[2] TS-734-ITAT-2012 (Mum)
[3] TS-567-ITAT-2012 (Mum)

4. *Castleton Investment Limited (AAR[4])*

In the absence of any factual proof on the part of the Revenue Authorities, treaty benefits for capital gains derived by a Mauritius tax resident on sale of shares of an Indian Company cannot be denied

The Applicant, a company incorporated in Mauritius, held 4% stake in the capital of a listed Indian Company since 1996 onwards. As part of the internal group restructuring, it was proposed to sell the shares of the Indian Company to a Singaporean group entity at the prevailing market price.

The Revenue Authorities alleged that the India-Mauritius tax treaty benefits should be denied to the Applicant since the investment through Mauritius was (i) a case of treaty shopping; and (ii) involved round tripping of funds, since the sources of funds for investment in the Indian Company were not explained.

The AAR laid emphasis on the fact that the investments were held since 1996 and that the Applicant is a separate legal entity vis a vis its UK parent company. The AAR also observed that the Revenue Authorities could not sufficiently rebut (i) that the applicant was the beneficial owner of the shares of the Indian Company; (ii) the permissibility of treaty shopping as upheld by the Supreme Court ('SC') in Azadi Bachao Andolan and; (iii) the presumption of allowing treaty benefits arising out furnishing of a Tax residency Certificate as allowed by the SC in Vodafone International Holdings BV.

The AAR also ruled that the India-Mauritius tax treaty benefits could not be denied to a Mauritius tax resident merely because capital gains are not actually taxed in Mauritius.

5. *Credit Suisse (International) Holding AG (AAR[5])*

Transfer of shares of an Indian Company on account of merger of two foreign companies would not be taxable in India since the gains on the merger are not determinable. However, on facts, the exemption under section 47(via) of the Act should not be available

Swiss Company 1 held 100% shares in another Swiss Company ('Swiss Company 2'). Swiss Company 2 held shares in an Indian Company. It was proposed to merge Swiss Company 2 into Swiss Company 1without any consideration as per the Swiss laws.

On facts, the AAR held that the exemption under section 47(via) of the Act will not be available to the present arrangement since one of the conditions as per the definition of 'amalgamation' under the Act which requires that shareholders of Swiss Company 1 to become shareholders of Swiss Company 2 pursuant to merger is not fulfilled.

The AAR however ruled that since the gains (if any) in this arrangement are not determinable within the scope of the Act, no capital gains arise to Swiss Company 2 in the said arrangement.

6. *Schellenberg Wittmer along with its partners (AAR[6])*

Tax Treaty benefits cannot be availed by a fiscally transparent partnership or its partners in respect of income earned by the partnership firm

The Applicant was a partnership firm with all its partners being Swiss tax residents. The Applicant was a law firm and fiscally transparent as per Swiss tax laws. The Applicant represented an Indian Company in adjudication proceedings conducted mainly in Switzerland. The AAR was asked (i) whether the professional fees received by the Applicant from the Indian Company were chargeable to tax in India; and (ii) whether the Applicant (ie partnership firm) would be considered as a resident of Switzerland as per the India – Switzerland tax treaty.

On facts, the AAR held that the receiver of income and the person who is taxed for the same are not the same as per Swiss tax laws. It was held that the Applicant is not a taxable entity in Switzerland and can hence not claim benefits of the India-Swiss tax treaty. Further, since the partners are not recipients of the income, they cannot claim benefits of the tax treaty in relation to such income.

[4] TS-607-AAR-2012 (AAR)
[5] TS-626-AAR-2012 (AAR)
[6] TS-649-AAR-2012 (AAR)

II. Overseas Rulings

Isha Sekhri
Chartered Accountant

1. Boston Scientific S.p.a. (Italian Supreme Court)

The Italian Supreme Court that an Italian company that acted as a commissionaire of a Dutch principal, did not constitute an agency PE of the Dutch principal since it did not qualify as a dependent agent due to its operational autonomy and the business risks borne by the Italian Company.

Boston Scientific S.p.a. (BS), is the Italian subsidiary of Boston Scientific International BV (BSI), a Dutch resident company. BS was responsible for the sales of BSI's goods in Italy and bore the costs related to the sales organization. Its remuneration was based on a commission proportioned to the volume of goods sold. According to the agreement signed by the two companies, BS was acting in its name and on its own behalf before Italian clients. BS received purchase orders from clients and automatically transferred them to BSI which processed the orders and carried out the relevant logistic activities, since the inventory was located and managed in the Netherlands and not in Italy.

The analysis made by the Regional Tax Court is based on a "substance over-form" principle according to which the assessment of the requirements triggering the existence of an agency PE in Italy should take into account the actual arrangements between the foreign entity and the Italian agent, and not be limited to an analysis of the legal clauses contained in the agreements put in place by the parties. Further, the existence of a mere agency or brokerage agreement between the parties or the status of a controlled entity cannot automatically trigger the existence of a PE. The corporate, contractual, business and commercial relations between BS and BSI and also between BS and other entities of the group were analysed and the Court concluded that BS could not be considered a dependent agent of BSI since BS had operational autonomy and was bearing the business risks associated with the sales activities performed in Italy. The judges decided that the sales contracts concluded by BS in Italy were not binding on BSI and that therefore BS could not have dependent status and hence BS could not be deemed to constitute an agency PE of the Dutch principal. The Supreme Court judges did not enter into an analysis of the subject matter and the Regional Tax Court decision was consequently affirmed.

2. Pepsi Co Puerto Rico, INC., v. Commissioner Of Internal Revenue[7] (The United States Tax Court)

The US Tax Court has held that the advance agreements exhibited more qualitative and quantitative indicia of equity than debt

PepsiCo, US decided to reconfigure its overseas structure and sought to create instruments i.e. 'advance agreements,' which would be classified, partially, as debt in the Netherlands and treated as equity in the United States. It was contemplated that the tax treatment of these instruments would preserve the foreign tax benefits achieved in the Netherlands. The US IRS sought to characterize the advance agreements as 'debt' since the payments received by the US parent company from Dutch group entities were subject to corporate taxes in the US, as the payments were 'interest payments' and not returns on capital investment.

The US Tax Court ruled in favour of PepsiCo and held that the advance agreements were appropriately characterized as equity for Federal income tax purposes based on the following:

- A fixed or ascertainable maturity date and a definite obligation to repay an advance;
- The absence of any legitimate creditor safeguards afforded to the holders of the advance agreements;
- Whether the taxpayer advancing the funds was acting as a creditor or an investor;
- Petitioners' intentions comport with the substance of the transaction.
- The purpose of examining the debt-to-equity ratio in characterizing an advance is to determine whether a corporation is so thinly capitalized that repayment would be unlikely.
- The terms of the advance agreements could not have been replicated, in any reasonably similar manner, by independent debt financing.

3. NA General Partnership, et al. v. Commissioner (The United States Tax Court)

The US Tax Court held that notes given by a US company to its ultimate UK parent in exchange for its stock constituted debt for US federal tax purposes

[7] T.C. Memo. 2012-269

ScottishPower plc (ScottishPower), a publicly held UK utility business, entered into a merger agreement with PacifiCorp, a publicly held US utility company, pursuant to which PacifiCorp would become ScottishPower's indirect wholly owned subsidiary. In consideration for ScottishPower transferring its shares to PacifiCorp's shareholders, NAGP issued to ScottishPower fixed-rate notes and floating-rate notes (Notes) and claimed interest deductions on the Notes.

The Tax Court applied eleven factors, to determine whether the Notes were debt or equity for US tax purposes: (1) the name given to the instrument; (2) the presence of a fixed maturity date; (3) the source of the payments; (4) the right to enforce payments of principal and interest; (5) participation in management; (6) a status equal or inferior to that of regular corporate creditors; (7) the intent of the parties; (8) "thin" capitalization; (9) identity of interest between creditor and stockholder; (10) payment of interest only out of earnings and (11) the corporation's ability to obtain loans from outside creditors. Acknowledging that no one factor is determinative and that all of the facts and circumstances must be weighed when making a debt/equity characterization, the court found that the Notes were more akin to debt than equity and so held that the payments at issue were deductible as interest.

4. Taiwan Tax Ruling (Name and citation not available)

Taiwan Tax Authority clarifies payments to foreign companies for use of online database are business profits

Taiwan's tax authority issued a tax ruling clarifying the character of a payment made to a foreign entity for provision of specific online database services to Taiwanese customers as business profits, rather than royalty payments, if the following conditions are met:

- The foreign company does not have a fixed place of business or a business agent in Taiwan and the online database service activities are entirely performed and completed outside Taiwan;
- The foreign company's core business is the rendition of online database services;
- The online database provides electronic transcripts of full texts, references, tables of contents, abstracts, and statistical data of periodicals, books and dissertations, and enables users to search for and extract specific information for self-use purposes;
- The users can only download, save and print the data from the online database; and
- The users do not have rights to reproduction, distribution, editing, change and other commercial use of the copyrighted materials.

International Tax Updates – India and Global

Anand Patel, Isha Sekhri
Chartered Accountants

I. India

1. The Government of India ("GoI") has issued draft guidelines regarding implementation of the General Anti Avoidance Rules. This draft recommends the following key proposals to be included in the Income Tax Circulars and Rules:

   - Monetary threshold for invoking GAAR
   - Detailed Circular for GAAR applicability
   - Safe harbour for Foreign Institutional Investors
   - Prospective operation of the GAAR
   - Definition of 'connected person'
   - Tax consequences of a part of the arrangement being impermissible
   - Indicative list of examples to illustrate the application of GAAR provisions

2. An Expert Committee on GAAR ("EC") constituted by the Prime Minister has presented its draft report recommending amendments in the Act, in Income-tax Rules and clarifications / illustrations through a Circular.

   EC has made number of recommendations in its draft including deferral of GAAR by three years, monetary threshold, negative list, prospective application of GAAR, GAAR to invoked only if main purpose is to obtain tax benefit etc.

3. This EC was also referred analyse and provide recommendations on provisions taxing of indirect transfer in India. The EC in its draft report recommended for prospective application after providing clear definitions and in case of retrospective application recommended for non-levy of interest & penalties.

4. The Central Board of Direct Taxes notified the APA Scheme inserting Rules 10F to 10T that lay down the APA guidelines which will be effective 30 August 2012.

   APA application may be filed for transactions of continuing nature in which case, the application is to be made before 1 April of the financial year for which the application is made or for new transactions, before undertaking the transaction, in the prescribed form along with the supporting documents and fees.
   (Source: Notification No. 36/2012/F. No. 133 /5/2012-SO (TPL))

5. The GoI has signed on October 3, 2011 a Tax Exchange Information Agreement with Liberia. The same has been notified on August 17, 2012 and shall come into force on March 30, 2012.
   (Source: Notification No. 32/2012-FT&TR-II [F.No. 503/02/2010-FT&TR-II]/SO 1877(E))

6. The GoI has signed on June 11, 2012 a Tax Exchange Information Agreement with Guernsey. The same has been notified on August 9, 2012 and shall come into force on June 11, 2012.
   (Source: Notification No. 30/2012 [F. No. 503/1/2009-FTD-I]/SO 1782(E))

7. The GoI has signed a tax treaty with Lithuania on July 26, 2011 and notified the same on July 25, 2012. It shall come into force on July 10, 2012
   (Source: Notification No. 28/2012 [F. No. 503/02/1997-FTD-1])

8. Government approval for lower withholding tax rate on foreign borrowings by specified borrowers has been prescribed by CBDT if the conditions in respect of (i) agreement of loan (ii) issue of Bonds (iii) rate of interest are fulfilled.
   (Source: Circular No. 7/2012 [F.No. 142/17/2012-SO(TPL)], dated 21-9-2012)

9. CBDT has issued Income Tax rules in respect of the contents of Tax Residency Certificate for claiming relief under the Tax Treaty ("TRC") by non residents and the format for application by Indian resident to the Indian Tax Officer for TRC

   (Source: Notification No. 39/2012 [F.No.142/13/2012-SO(TPL)]/SO 2188(E), dated 17-9-2012

10. CBDT has relaxed mandatory electronic furnishing of tax return in cases of (i) agent of non-residents as Representative Assessee and (ii) private discretionary trusts.
    (Source: Circular No. 6/2012 [F.No.133/44/2012-SO (TPL)], dated 3-8-2012)

11. The multilateral convention on Mutual Administrating Assistance in tax matter (as amended by 2010 protocol) signed by the GoI has been notified on August 28, 2012 and shall come into force from June 01, 2012.

II. Global

1. OECD: Update on PE Discussion Draft

The OECD's Working Party 1 held a meeting with commentators on 7 September 2012 on the discussion draft relating to the interpretation and application of the commentary to Article 5 of the OECD model tax treaty. The discussion draft addresses a multitude of problems relating to the concept of a PE, including a preliminary clarification will be made in relation to contract manufacturing, and a proposed paragraph on activities of a recurrent nature.

2. UK Government issues Consultation Paper on "Lifting the lid on Tax Avoidance Schemes"

The United Kingdom's HMRC has issued a Consultation Paper to discuss how Tax Avoidance Schemes are created and what steps can be taken to expose them.

3. European Commission adopts final report of the EU Joint Transfer Pricing Forum on cost contribution arrangements on services not creating Intangible Property

On 19 September 2012, the European Commission has adopted the EU Joint Transfer Pricing Forum's final report on "Cost Contribution Arrangements on Services not creating Intangible Property" and includes a separate report on SMEs and transfer pricing.

4. US and Canada Competent Authorities set standards on attribution of profit to a PE

The Canadian and US Competent Authorities have entered into a new agreement on 26 June 2012, on the treatment of business profits under the Canada-U.S. tax treaty to ensure consistency with the OECD's Report on the Attribution of Profits to Permanent Establishments

5. US Foreign Account Tax Compliance Act ('FATCA') Updates

On 26 July 2012, the US Treasury Department issued the first model for an Intergovernmental Agreement (IGA) for complying with the FATCA provisions. The Model IGA, provide a framework for reporting by certain financial institutions about U.S. account holders to their respective tax authorities, with automatic exchange of information between tax authorities under existing tax treaties or information exchange agreements.

6. US and UK sign agreement on FATCA implementation

The US Treasury Department has signed a bilateral agreement with UK to implement the information reporting and withholding tax requirements of FATCA. The UK HMRC subsequently released Implementing the UK-US FATCA Agreement Consultation Document.

7. US IRS provides guidance on outbound transfers of intangible property

On 13 July 2012, the IRS released a Notice announcing upcoming regulatory amendments that will address the outbound transfers of certain intangible property in certain outbound asset reorganizations and targeting transactions designed to repatriate earnings without the "appropriate recognition of income".

8. China Clarifies Beneficial Owners' Status for Treaty Benefits

On 29 June 2012, the China State Administration of Taxation announced basic parameters for determining beneficial ownership status relevant for claiming tax treaty benefits by tax residents of the participating Contracting State in respect of passive income derived in China.

9. Australian Parliament passes Retrospective transfer pricing law and new transfer pricing rules

The Australian Parliament has passed the "treaty-equivalent" transfer pricing rules, to apply retrospectively from 1 July 2004 and provides the Commissioner with an additional power to make transfer pricing adjustments to dealings with related parties in countries with which Australia has executed a DTAA.

10. Russian Ministry Confirms that the Transfer Pricing Rules Apply to Interest Expenses

The Russian Ministry has confirmed that transfer pricing rules must apply to transactions between interdependent persons where interest income / expense on debt obligation is earned / incurred.

11. Introduction of changes in Brazilian transfer pricing regulations

On 19 September 2012, the Brazilian Government issued Law amending existing Brazilian transfer pricing regulations including interest on related party loans, newly introduced methods for commodities, and price tests in the case of exports based on prices informed by regulatory agencies.

12. Transfer pricing reform passed by Chilean Parliament

The Parliament has approved the tax bill introducing specific transfer pricing legislation that will be effective from January 2013. The modifications include introduction of the OECD transfer pricing methodology; requirement to file an annual informative return and penalties for non-compliance; introduction of an APA program; and possibility of corresponding transfer pricing adjustments.

13. Canada - Thin Capitalisation Rules

The Canadian Finance released draft legislation to modify the thin capitalization rules to reduce the debt-to-equity ratio to 1.5:1 (from 2:1), extend the rules to partnership debt, and introduce a new deemed dividend rule for excess interest expense.

14. Russia issues clarification on the Application of the Thin Capitalization Rules to Loans Guaranteed by a Foreign Shareholder

The Russian Ministry of Finance has issued a clarification that the domestic thin capitalization rules cannot apply to interest paid by a Russian entity to a non-affiliated foreign lender on a loan guaranteed by a foreign shareholder holding participation less than 20% in the capital of the borrower.

15. Netherlands 2013 budget includes repeal of thin capitalization rules

The Netherlands' proposed 2013 budget includes the abolition of the thin capitalization rules as from 1 January 2013. A more specific interest deduction limitation which was adopted earlier this year will enter into effect on 1 January.

Experts Speak

Whether any further profits need to be attributed to Dependent Agent Permanent Establishment ('DAPE') if the Dependent Agent ('DA') is paid remuneration at arm's length compensation?

Sudhir Nayak
Senior Tax Professional

On January 20, Hon'ble Supreme Court pronounced its decision not to tax indirect transfer transaction in favour of Vodafone and on March 16, Hon'ble Finance Minister proposed to overturn the ruling. While the Apex Court in no uncertain terms held that indirect transfer transaction cannot be taxed in India, Finance Minister in equally uncertain terms brought in a large number of "*clarificatory amendments*" to tax these transactions. What took everyone by surprise was that these amendments are pitched as "clarificatory" and "for removal of doubts" and thus stated to be in operation from 1962, almost 50 years ago.

Interestingly, an affirmative response to the above question could be one of those occasional instances when the OECD and Indian tax authorities see eye to eye. Indian jurisprudence had its first significant taste of DAPE attribution in the case of Set Satellite (Singapore) Pte Ltd[8].

The matter of additional attribution would truly turn upon the adoption of a "functionally separate entity" approach versus the "business activity approach". The former approach is advocated by the OECD[9] and supports a proposition that additional attribution may be warranted in certain cases.

The typical provisions of Article 7 of tax treaties permit the Source State to tax profits which are attributable to the Permanent Establishment ('PE') of a foreign enterprise in the Source State. The computation of such profits rests on the assumption of existence of the PE as a separate, independent enterprise. ***This exercise thus involves the hypothetical existence of a DAPE which is separate from (i) the foreign enterprise; and (ii) the DA.*** As a corollary, the profits of the PE should be commensurate to the rewards it could earn ***independently*** from capital employed, functions performed and risks assumed ('additional FAR') in the ordinary course of business. Accordingly, mere remuneration at arm's length to a DA for the agency functions provided by it might not adequately reflect the additional FAR of the DA in its capacity of a DAPE. Additional attribution for the functions /assets / risks of the DAPE in addition to the agency functions performed would thus be in line with Article 7. Adopting a view that dealings between the taxpayer and its DAPE (as opposed to the DA) need not be at arm's length does not appear convincing.

Even more importantly, in case one adopts a view that no additional attribution is necessary, the same would render the concept of constitution of DAPE redundant. The remuneration received by a DA would ordinarily be taxable in State of Residence of the DA which is typically the Source State for the foreign enterprise. If that be the case, the Source State would garner taxes on such remuneration (albeit in the hands of the DA rather than the foreign enterprise). Accordingly, if no additional attribution was mandated, there would be no requirement to have the concept of DAPE in the tax treaties.

Support for this view can also be drawn from a reading of Supreme Court ruling in Morgan Stanley[10] which did not expressly rule out further attribution of profits to a PE. Further, the Mumbai Tribunal ruling in Delmas France[11] has also left this controversy open by observing that on a conceptual level, the argument of no additional attribution may not always be justifiable since the DAPE may possibly carry an entrepreneurial risk for which it has not been remunerated.

In conclusion, the need for additional attribution would be based upon the FAR analysis for the DAPE. In absence of any additional FAR by the DAPE, no additional profit attribution may be warranted. One would need to be wary of possibility of claiming tax credit in the Resident State for such additional profit attribution which is taxed in the Source State.

[8] Set Satellite (Singapore) Pte Ltd v DDIT (International Taxation) & Anr (307 ITR 205) (Bom)
[9] 2010 Report on the attribution of profits to permanent establishments dated 22 July 2010
[10] DIT (Intl tax) vs. Morgan Stanley & Co. Inc. (SC) (292 ITR 416)
[11] Delmas France v ADIT (49 SOT 719) (Mumbai)

IFA – Quarter Gone By

October 05 2012 – Study Circle Meeting

A study circle meeting on '**Introduction to APA Guidelines in India**' was conducted at IMC.

The speaker of the meeting was Mr. Amol Tibrewala.The presentation of the speaker was exhaustive, encompassing and was well responded by the members as well as non-members attending the meeting.

IFA – Save The Date

Forthcoming Study Circle Meetings

Day and Date	Thursday, 1 November 2012	Wednesday, 4 December 2012
Topic	Analysis of (a) expression 'International Transaction' and (b) meaning of 'Intangible property' as inserted vide Explanation to Sec 92B retrospectively by Finance Act, 2012	Use of Bilateral Investment Protection Treaties to arbitrate international tax disputes
Speaker	Mr. Freddy Daruwala, Partner, Nasikwala Law Office	Mr. Marcus Desax and Mr. Marc Veit, Partners at Walder Wyss, Switzerland
Venue	Kilachand Conference Room, IMC Building	To be Announced
Time	6 pm to 8 pm	To be Announced

Your feedback / suggestions are welcome. Please write at **ifaindiabranch@gmail.com**