IFA-INDIA BRANCH NEWSLETTER

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CHAIRMAN'S COMMUNIQUE

Dear Members,

It was in November, 2005 that the new Executive Committee got elected for the term of 2005-2007.

I feel highly honoured to be the Chairman of new Executive Committee which consists of illustrious, professional colleagues. The rich experience, professional knowledge and vision of the newly elected Executive Committee Members, I am quite sure, will immensely benefit the members in general and me in particular.

As you know IFA has a membership of more than 10,000 members world over and I am happy to inform you that the membership of India branch makes it the sixth largest branch in the world.

FIRST INDIA – US JOINT INTERNATIONAL TAX CONFERENCE:

You would be glad to know that we organized a highly successful US-India Joint International Tax Conference on January 23-25,2006 at Hotel Taj Palace, New Delhi. This first ever endeavour of two Branches of IFA to come together for the purpose of academic pursuits was attended by more than 250 delegates and was recognised by Central IFA as a Regional Conference. Taking inspiration from our experience, recently China, Korea and Japan Branches of IFA also held a Regional Conference in Tokyo on 9th and 10th March, 2006 and now IFA Mauritius is holding a Joint Conference with IFA-India on 27th and 28th July,2006 in Mauritius. Such Joint conferences are very helpful to the members to understand the domestic laws of the two countries as also the judicial trends in the two countries in interpreting the treaties. They also provide an excellent opportunity for networking.

Mr. Mukesh Butani, Mr. Rahul Garg, Mr. Anurag Jain, Ms. Amisha Singhal & all their team members put in tireless efforts to make this Conference a grand success.

RESIDENTIAL REFRESHER COURSE (RRC) BY WESTERN REGION AT MAHABLESHWAR:

The Western Region held the Second RRC at Mahableshwar from 8th to 11th April, 2006. There were seven technical sessions including a marathon session of panel discussion on case studies. This Conference was a tremendous success mainly due to the efforts of Ms. Tara Rao, the Conference Chairperson, Mr. Kuntal Dave & Mr. Nilesh Kapadia, the Joint Secretaries of WRC & Mr. Sunil Lala, the Treasurer of WRC. A detailed report of this Conference is included in this Newsletter.

RECENT DEVELOPMENTS AT CENTRAL IFA, NETHERLANDS :

I had an occasion to attend the Meeting of the Executive Committee of Central IFA held at Amsterdam on 22nd April, 2006. This was the first meeting held after my appointment in September, 2005 on the Executive Committee of Central IFA. Various policy decisions were taken amongst which an important decision was to delete the names of members, whose payments are in arrears beyond 31st March of each year. On the basis of a request from India Branch, it was decided to relax the date up to 15th May, 2006 in case of India as an exception. Our Hon. Secretary Mr. Sushil Lakhani, has been pursuing with all Regional Offices to ensure that no members' name is deleted.

ADMINISTRATIVE SUPPORT & SHIFTING OF OFFICE:

IFA India Branch has its Registered Office at New Delhi and has been functioning from there since its inception. However, due to lack of support staff, funds and co-operation of officials, it was decided to shift the Administrative office of IFA India Branch to Mumbai where IFA has its own office premises located in the business District of Mumbai. Further, except the Vice Chairman and the Joint Secretary, as all office bearers also have been elected from Mumbai administratively it would be convenient to handle the day-to-day operations effectively from the said office.

Unfortunately, the new Executive Committee did not get any support from the erstwhile office bearers who initially, did not participate in handing over the charge of upto date accounts and Bank cheque books to the new office bearers. I must appreciate the untiring efforts of our Hon. Secretary who compiled a members' list and upto date accounts from the records available and the information obtained. But this exercise has delayed the whole process of recovery of fees of members this year.

FUTURE IFA CONGRESSES:

As you all know, the 60th Annual IFA Congress is being held at Amsterdam from 17th September to 21st September, 2006 for which invitations have already been posted by IFA.

The Executive Committee of Central IFA unanimously decided to approve the request of India for holding Congress and accordingly India will again be hosting 68th Annual Congress in the year 2014 after a gap of almost 17 years i.e. after 1997 Congress held at New Delhi. In due course venue of the said Congress will be decided.

IFA OECD — RESEARCH PROJECT:

IFA had invited nomination of a reporter or IFA-OECD Research Project (PATT) in the framework of Segment V of the David R. Tillinghast Research Programme. We have nominated Mr. Kirit Dedhia, a member of our Branch, as the Reporter from India during the year.

YOUNG IFA NETWORK (YIN):

Central IFA has initiated a Young IFA Network Committee to attract more members in the early stages of their career and to develop, propose, implement programmes at branch and worldwide level. In this endeavour, we have nominated Mr. Kuntal Dave, a young member from our Branch and also our Executive Committee member of our Branch, as India's representative on this Committee.

THE BRUSSELS CONGRESS 2008:

We have received a request to appoint the reporters on two subjects for the said congress. Interested members are requested to send their response as quickly as possible so that we can nominate them at the earliest.

The Subjects as usual are very interesting:—

Subject I — Non Discrimination in tax matters.

Subject II — Taxation of Interest, New tendencies.

PERMANENT SCIENTIFIC COMMITTEE (PSC):—

With a view to make the Congresses more lively and interesting, the PSC has set up a Committee to suggest ways to change the format of the sessions at the annual congresses. Members of the said Committee are :

Prof. Jean Pierre Le Gall (Chairman PSC)

Prof. Brian Arnold (Canada)

Mr. Manuel Tron (Mexico)

Mr. Porus Kaka (India)

Members are invited to send their suggestions to them.

IFA ACADEMY:

In pursuance to the decisions of the Executive Committee held in July, 2005, IFA Academy will now be pursued as a division of IFA India Branch. Steps have been initiated to compile a complete project report & a viability study so that Academy's work can be started at the earliest.

FORTHCOMING PROGRAMMES:

IFA Regional Chapter and Sub-Chapters have planned various programmes. Some of them are :

(1) One day seminar on International Taxation is being shortly organised at Hyderabad.

(2) Two days Regional Conference. Jointly with IFA-Mauritius is being organised at Mauritius in July, 2006.

(3) Two days International Tax Conference is organised at Chennai in September, 2006.

(4) A Tax Technology Conference is being organised at Bangalore

I am sure members will take advantage at all these programmes by attending the same in large numbers. I look forward to receiving valuable suggestions from the members for the future programmes.

Yours Sincerely,

T.P. Ostwal

Chairman – IFA INDIA BRANCH

Place : Mumbai.

Date : 5TH June, 2006

REPORT

PERMANENT SCIENTIFIC COMMITTEE (PSC) ... BY PORUS F. KAKA

The PSC meeting was spread over two days in Amsterdam on the 3rd and 4th February 2006, various issues were taken up for discussion briefly as under:-

A. THE SECRETARY GENERAL REPORTED THAT:

Buenos Aires Congress attracted 1370 participants and 367 accompanying persons, which was a very satisfactory number and the luncheon for Government representatives was very successful. Financially **IFA** is in good shape with expected profit for 2005 of 80,000 Euro and 50,000 Euro for 2006, but the financial results for 2007, depends significantly on the sponsorship contract for the Cahiers with MeesPierson Intertrust. He also mentioned that the Young IFA Network was set up with a special meeting to be held at the Amsterdam Congress. For Amsterdam Congress an electronic platform will be set up to facilitate online communication and discussion between members of the 2006 panels. Panelists would also be entitled to unrestricted access to the databases of RIA Thomson and IBFD. Amsterdam Congress participants would have restricted access.

B. DAVID R. TILLINGHAST RESEARCH PROGRAMME

The IFA / OECD project on "Practical application of tax treaties" was progressing according to schedule and meeting Branch representatives would be held in Amsterdam on September 16, 2006, followed by a publication of the reports by the time of the Kyoto Congress. A possible segment on the use by national courts of foreign court decisions could be considered.

C. REVIEW OF MAIN SUBJECTS AND SEMINARS AT THE 2005 BUENOS AIRES CONGRESS:

The PSC was informed about 481 reactions out of 1370 participants (i.e. 35%) 60% of Congress participants attended the sessions. Though topics were interesting, some presentations received lower ratings except IFA/OECD seminar. The opinion of most was that inter alia emphasis on national systems was found to be boring. Voting experiments will be continued in a more structured manner. Prior to the meeting Prof. Brian Arnold from Canada had circulated a memorandum indicating suggestions on how to make the IFA Congresses and the sessions/seminars therein more interesting to the participants. There was significant discussion on Prof. Arnold's Memorandum suggesting changes in the format of the Congress sessions with a view to making them more lively and interesting, such as lectures by a renowned tax expert, a presentation by a

scholar, mock trials or debates by two recognized tax experts. A sub-committee of Messrs Brian Arnold, Porus Kaka and Manuel Tron was formed, with Prof. Le Gall in an ex-officio capacity to report back to the PSC with suggestions.

D. AMSTERDAM CONGRESS.

It was decided that Cahiers would continue to be in English. Detailed discussion took place on the selection procedure of panels. Based on representations made by PSC members on the selection procedure for various panels it was agreed that the procedure ought to be more transparent with the final decision resting with the Chair of the PSC, the Secretary General and the Chair of the particular session.

In thee Amsterdam Congress, Mr. Radhakrishna Raval from India will be a speaker in main session on subject 2 – "Attribution of profits to PEs". Last year Mr. Atul Dua had been accepted as a speaker from India.

E. KYOTO CONGRESS.

Detailed discussion on draft directives - Subject 1 – "Transfer Pricing and Intangibles" and Subject 2 "Conflicts in the attribution of income to a person". Companion seminars on "Transfer Pricing and Cost sharing arrangements". together with other companion seminars:

— Treaty entitlement and collective investment vehicles (including trusts);

— Treaty entitlement and limitation on benefits (LOB) clauses were discussed.

Brief discussion on Panelists for Kyoto Congress.

Mr. Roy Rohatgi was selected as Chairman of companion seminar – subject 2 – "Treaty entitlement and limitation on benefits"

F. BRUSSELS CONGRESS:

Cross-border pensions as main subject was substituted with Non discrimination in tax matters (subject 1). Subject 2 – would be "Taxation of Interest, new tendencies." Discussion on proposed seminars could include:-

a. application of tax treaty to short term assignment, cross-border pensions, judges companion seminar on non-discrimination or use of foreign court ruling – tax treaty interpretation.

b. Invite from IFA-India members suggestions for speakers for Brussels Congress based upon the criteria already laid down earlier.

G. VANCOUVER CONGRESS.

Discussion on main congress, subjects and seminars - tentatively - main subjects could include:

i) Interpretation of the permanent establishment definition in tax treaties.

ii) Relief of international double taxation of dividends from direct or substantial investments in foreign corporations.

iii) End of withholding taxes;

PROPOSED SEMINARS:—

i) The role of international organizations in international tax;

ii) The (non) taxation of the international shipping and film industries: the race to the bottom;

iii) Collective investment vehicles on tax treaties;

iv) Tax amnesties;

v) Judicial role in controlling (international) tax avoidance;

vi) Relationship between residence under tax treaties and domestic law;

vii) Allocation of business profits among states: from theory to practice.

CONCLUSION

Following upon the PSC Meeting in February, the sub-committee (referred to in para C supra) of which I am a part is proceeding to prepare a report which will be forwarded to the PSC before the next meeting in September.

I am sure some of our recent Tax decisions will be of interest in the Amsterdam Congress and will be taken up for discussion like the Special Bench decision in the case of ABN-Amro. Recently we in India were delighted and proud that Prof Klaus Vogel commended our Indian Tax Judiciary. However one must draw a note of caution as I am equally aware of criticism in the International arena of some of our decisions. While we justifiably take pride in Prof Vogels comments and I convey my personal congratulations to the President of the Tribunal and all its members, we must remember that this reputation is hard earned and to keep it will be equally daunting. International Tax Law is a separate branch of Tax Law and its manner of interpretation is also different from domestic statutory interpretations. In a short while from now the first "Transfer Pricing" disputes will reach the gates of the Tribunal. The decisions given by the Tribunal will be looked forward to by the International community and subjected to critical (or praiseworthy) comment.

ACTIVITIES OF IFA-INDIA BRANCH

The IFA-India Branch organized a Joint Session of India and USA Branches of International Fiscal Association from 23rd – 25th January, 2006 at Hotel Taj Palace, New Delhi, which was a grand success having participation of about 300 participants from India, USA and other countries. Besides the presence of Senior Officials both from the Indian as well as USA side, a number of senior Income Tax Officials also participated in the Conference in their individual capacity. The details are attached as ***Annexure 1*** to this Newsletter.

NORTHERN REGION

The Northern Chapter has continued its practice of having Study Circle Meetings on every third Friday of the month at India Habitat Centre, New Delhi. Various Study Circle Meetings held by the Chapter were:

a. October 2005 - Presentation on latest rulings by Authority for Advance Rulings & Implications of Section 40(a)(ia) of the Income Tax Act, 1961 by Mr. S.R. Wadhwa - Chairman, NRC-IFA India.

b. November 2005 – Presentation on "Use of Cyprus for Indian inward and outward investments" by Mr. Panicos Kaouris, Partner in charge of taxation services, PricewaterhouseCoopers, Cyprus

c. December 2005 – Discussion on Works Contract, Right to use, Central Sales Tax & VAT by Mr. Sushil Verma, Advocate.

d. February 2006 – Deliberation on "Recent Controversial Issues in International Taxation" by Mr. S.D. Kapila, Advocate & CCIT (Rtd.)

e. April 2006 – Presentation on Deemed Dividend u/s 2(22)(e) of the I.T. Act, 1961 by Mr. Shashi Bhushan Gupta, Advocate.

f. May 2006 – Presentation on Speculative Transactions under Income Tax Act with emphasis on Stock Exchange Transactions by Mr. Vinod Jain, Practicing Chartered Accountant.

In the month of March, 2006, instead of the Study Circle Meeting, immediately after the presentation of Budget by the Hon'ble Finance Minister in the Parliament, the Chapter organized an Interactive Seminar on "Budget 2006" which was chaired by Mr. Arvind Modi**,** Joint Secretary (TPL) - Department of Revenue. Presentation on changes made in the provisions relating to Direct and Indirect Taxes were made as under:-

1. Direct Taxes – Ms. Neeru Ahuja, Senior Director, Deloitte Haskins & Sells

2. Indirect Taxes – Mr. S.Madhavan, Executive Director, PricewaterhouseCoopers Pvt. Ltd.

There was a detailed discussion on the various provisions as contained in the Finance Bill 2006. Mr. Arvind Modi actively participated in the discussion and explained the rational and Government's points of view on the various changes introduced vide Finance Bill 2006. He also shared the concern of members in regard to certain proposed changes in the Income Tax Act such as amendments in Section 43B relating to Conversion of Unpaid Interest on Loans into Equity or Loan, certain retrospective amendments and amendments made relating to provisions of MAT etc.

The Chapter has also started discussing Avoidance of Double Taxation Agreements clause by clause in every Study Circle Meeting in addition to the topic of Study Circle Meeting and has in the last two study circle meetings held in the month of April and May 2006 discussed the Article relating to "Residential Status".

WESTERN REGION

The Western Chapter held its 2nd Residential Refresher Course in April, 2006 at Mahabaleshwar. This was attended by around 100 delegates. Details of the said RRC are attached as an ***Annexure 2*** to this Newsletter.

Lecture meeting on "Recent Case Laws on Cross Border Transactions" by Shri Pranav Sayta, Ernst And Young Pvt. Ltd. was held immediately after the Chapter's AGM, and was attended by many members. The speaker analysed several recent judgments / rulings on international taxation, including the Nokia – Motorola – Ericson case.

Study Circle Meetings held by the Chapter were:

a. Presentation on "Use Cyprus in Inbound And Outbound Investments" in November 2005 by Panicos Kouris and Marios S Andreou, Pricewaterhouse Coopers, Cyprus.

b. Presentation on "Setting Up Business In UAE'' covering legal requirements of company formation, both in and outside FTZ, with details of permitted activities by CA Neetish Doshi, Dubai

c. Deliberations on the Kolkatta Tribunal decision in the case of ABN Amro bank by CA Vikram Bohra on 25th November, 2005

Ahmedabad Sub-Chapter

A One Day Conference on "International Tax and Transfer Pricing" was held in March, 2006. Details of the topics discussed and the faculties are given under Table No. 1.2.

Details of Study Circle meetings held during the period from 1st January to 31st March, 2006, where the comparative study of the Articles of Treaties signed by India with USA,

UK, France, Germany, Singapore and Malaysia was made are as under:

a. January 2006 – Article 26 and Recent important judgments, presented by Shri Dhinal A. Shah, FCA.

b. January 2006 – Articles 15, 22 and 23 presented by Shri Hiren D Shah, FCA

c. February 2006 – Articles 1 to 9 presented by Shri Mayur B. Nayak, FCA, Mumbai

d. March 2006 – Articles 10 to 30 presented by Shri Sushil U. Lakhani, FCA, Mumbai.

Hyderabad Sub-Chapter

The Hyderabad Sub-Chapter organized a seminar on '**FEMA, TDS & Transfer Pricing'.** It was held on 1st October 2005 at Hotel Taj Banjara, Hyderabad. The seminar was inaugurated by Mr.C.R.Muralidharan, Member, IRDA, Hyderabad. Mr. P.V.R Rajendra Prasad of Prasad & Prasad, Hyderabad spoke on **'Practical Issues Inbound & Outbound Investments'**. Mr.V. Ranganathan of Ernst & Young, Chennai spoke on **'Recent Judicial Rulings – TDS, Sec.195 – Non-residents'.** Mr.Ketan Dalal of RSM & Co., Mumbai spoke on **'Transfer Pricing Assessments'**. Mr. K.R. Sekar of Deloitte Haskins & Sells, Bangalore spoke on **'Case Studies in Transfer Pricing'**. Mr. H. Srinivasulu, IRS, C.I.T, Vizag & Former Director of Income Tax (Transfer Pricing) Chaired the session of Transfer Pricing.

Second Anniversary of Sub-Chapter was held at Taj Krishna, Hyderabad. Mr. T. P. Ostwal, Chairman, IFA, India Branch was the Chief Guest. He addressed the delegates giving a power point presentation highlighting IFA Central and India Branch activities and its benefits to the members. Mr. P V S S Prasad, Chairman, IFA-Hyderabad Sub-Chapter addressed the delegates and members giving a power point presentation on the past and proposed activities of its Sub-Chapter.

Two Study Circle Meetings on 29th November, 2005 and 23rd February, 2006 were conducted respectively on the following topics:

a) 29th November, 2005: Mr. B.Vijay Prasad, FCA spoke on 'Business Profits – Article 7 of Model Tax Convention'

b) 23rd February, 2006: Mr. T.P.Ostwal, Chairman, IFA, India Branch addressed the members giving a power point presentation on 'Recent International Taxation cases on the eve of 2nd Anniversary.

IFA CONGRESSES

1. 60th IFA Congress — September 17-22, 2006 Amsterdam, The Netherlands

Main Subjects

Subject -1: The Tax Consequences of restructuring of indebtedness (debt *work-outs)*

Break-out Sessions:

1A: The Tax Consequences of restructuring of indebt edness (debt work-outs) between related parties.

Subject - 2: The Attribution or profits to permanent establishments (PEs)

2A: The attribution of profits to PEs: selected issues for financial institutions

2B: The attribution of profits to PEs: EC law and non discrimination issues.

Seminar Subjects:

a. Indirect tax aspects of cross-border services.

b. IFA/OECD-Do enterprises mean business?

c. International cooperation countering tax avoidance

d. The effect of regional and global trade agreements on domestic tax law and bilateral tax conventions

e. Recent developments in international tax

f. IFA/EU: the need and scope for coordination of tax policies in the EU

g. Tax accounting versus commercial accounting.

2. 61st IFA Congress – September 30-October 5, 2007 Kyoto, Japan

Main subjects of the Congress

Subjects of the Congress will be decided in due course of time. The future Congresses upto 2011 will be held in the following Cities:

2008	Brussels	Belgium
2009	Vancouver	Canada
2010	Rome	Italy
2011	Paris	France

ARTICLE

SPECIAL ECONOMIC ZONES

... By Jay Prakash Rai

With the SEZ Act 2005 and the corresponding Rules having come into effect from February 10, 2006, the SEZ chapter in India's economic development is now truly on its way. Inspired largely by the Chinese success story, Special Economic Zones as a model of economic growth were first mooted in the EXIM Policy of 2000. To implement this, amendments were made to various acts, many executive instructions were issued and even more policy guidelines framed, with the result that development of SEZs was scattered in myriad pieces of legislations and sub-ordinate legislations. What the SEZ Act of 2005 has achieved is not only to have consolidated all these bits and pieces into one coherent piece of legislation, it has also provided a robust legislative foundation to the policy, one which cannot be subject to whimsical changes. This is a welcome development from the point of view of all serious investors. They can now rest easy that the rationale for their decisions to invest will not undergo rapid twists and turns.

In terms of ensuring an efficient work style, the creation of two authorities, each of which serves as a single window clearance mechanism (the Board of Approval for most matters relating to Developer, and the Unit Approval Committee for almost all matters pertaining to Entrepreneurs) is a significant development. Even the requirements of our federal structure and the clear demarcation of jurisdictions between the Centre and the States have been effectively resolved in the SEZ Act 2005, through the mechanism of incentivising the States into not only granting fiscal concessions which fall exclusively in their jurisdiction, but also by ensuring that these two authorities are able to dispose off all matters, even those falling within the purview of the state governments.

Overview of the SEZ Scheme

- SEZ is an area notified, as such, by the Central Government and is deemed to be outside the customs territory of India;
- The zone can be set up by Government, Private sector or jointly by them;
- The zone can be set up for Multi Product, Specific Sector, Services, as Free Trade and Warehousing Zone or as Port / Airport Zone.
- SEZ to be divided into "Processing" and "Non-Processing" area. Units and core infrastructure to be located only in "Processing Area". "Non-Processing Area" can be used for social / commercial development;
- Units in SEZ can undertake Manufacturing / Service activities. Manufacturing is defined very widely and Services have also been exhaustively defined;
- Contract manufacturing for overseas entities allowed;
- Single Window Clearance provided to Developers and Units;
- Administrative control / reporting requirements simplified and rationalised;
- Unrestricted sale to the domestic market is allowed from the SEZ units on payment of full import duty;
- There is no export commitment on either Developer or Unit in the SEZ;
- The only commitment on SEZ Unit is to be net foreign exchange earner at the end of the 5th year calculated cumulatively. Certain sales to Domestic Tariff Area also qualify for NFE criteria even though realised in rupees. No such commitment on Developer;
- State Government's recommendation for SEZ is required for clearance from the Central Government. Further, State Governments have been requested to endeavour to give fiscal and other benefits to the Developers and units;
- Infrastructure / social-commercial development can be undertaken by Co-Developer who is also entitled to all the benefits of Developer;

Sale of land not allowed in the SEZ.

Eligibility Criteria for SEZ Development

Type of SEZ	Min. contiguous vacant Land	Other requirements
Multi Product	1000 Hectares[1]	—-
Sector Specific / Service Sector/ Port-Airport based	100 Hectares[2]	—-
Free Trade & Warehousing Zone	40 Hectares	Minimum built up area of 100,000 sq. mtrs
IT/ITES Biotech, Non-Conventional Energy, Gems & Jewellery	Refer fresh criteria set out by the EGoM as listed under "Recent Development"[3]	

i) 200 Hectares if located in specified areas (Assam, Meghalaya, Nagaland, Arunachal Pradesh, Mizoram,

Tripura, Himachal Pradesh, Uttranchal, Sikkim, J&K, Goa and UTs)

ii) 250 Hectares if located in specified areas stated above

Tax incentives to Developers

- Deduction of entire profits from development and maintenance of SEZ for 10 consecutive years out of first 15 years w.e.f. date of notification.

  This deduction is also available on the commercial / social development in the non-processing area of the SEZ.

- No Dividend Distribution Tax

- No Minimum Alternate Tax

- Exemption from many indirect taxes in respect of procurements required for development of entire processing and unprocessing area of SEZ and operations in only Processing Area of SEZ– such as Central Excise, Customs Duty, VAT / Sales TAX, CST, Service-tax and many other state level taxes

Tax incentives to Units setup in SEZ

i) Exemption from Income-tax of export profits[1] as under:

   - 100% for first 5 years;
   - 50% for next 5 years; and
   - Up to 50% for further 5 years subject to creation of reserve

ii) No Capital Gains Tax on relocation from Urban area to SEZ

iii) No Minimum Alternate Tax to the extent of export profits1

iv) Exemption from many indirect taxes in respect of procurements of goods/ services for operations– such as Central Excise, Customs Duty, VAT / Sales TAX, CST, Service-tax and many other state level taxes

This has turned out to be good alternative for companies engaged in the export of goods and services as the STPI / EOU tax holiday is set to expire in the year 2009.

Recent Developments

An Empowered Group of Ministers (EGoM) has been constituted by the Central Government following reservations expressed by some quarters in the Government of India on the minimum area requirements for the IT/ITES, Biotech, Non-Conventional Energy and Gems & Jewellery SEZs, and some other issues. The first meeting of the EGoM was held on 10th May, 2006 to consider these issues.

While there is no official word as to the outcome of the deliberations of this meeting, according to reliable sources and media reports the following deliberations took place in the meeting.

Minimum Land Area Requirements for IT/ITES SEZs

i. No Minimum Land Area requirement.

ii. IT/ITES SEZs can be established on any size of land provided the following twin criteria's are met :

Tier-I Cities:

1 Minimum built-up area of 1 million sq. feet; and

2 Minimum employment generation of at least 10,000 people

Tier-II Cities:

1 Minimum built-up area of 5 lakh sq. feet; and

2 Minimum employment generation of at least 5,000 people

Tier-III Cities:

1 Minimum built-up area of 2.5 lakh sq. feet; and

2 Minimum employment generation of at least 2,500 people

iii. Tier-I, Tier-II, Tier-III cities would be notified in due course. While this may be easier done, there are some issues that will be more difficult to implement. For instance, over what period is the requisite number of jobs required to be created? What would be the implications for the Developer and the Unit if the same is not achieved? Since the jobs will be created by units located in the SEZ, how is the Developer of the SEZ supposed to keep a track of the number of jobs created? Hopefully, this and other related operational issues will be addressed by the formal notification when the same is issued by the Government of India.

iv. The issue of Minimum Land Area Requirements for Biotech, Non-Conventional Energy and Gems & Jewellery sectors was apparently postponed for discussion in the next EGoM meeting

EGoM was expected to meet on 23rd May, 2006 to settle the remaining issues. However, the meeting has not taken place and is postponed. Amongst other, the issues which were going to be discussed were revise norms for other sectors specific SEZs based on concerned ministry's recommendations. Ministry of Science and Technology's (MoST) is reported to have recommended 10 Acres (approx. 4 Hectares) for Biotech and Non-Conventional Energy SEZ as minimum land area requirements. Regarding Gems and Jewellery, Ministry of Commerce would be coming up with specific recommendations.

1 Exemption is available on profits earned through actual physical exports out of India.

Use of infrastructure in Non-Processing Area (Applicable to all SEZs)

1 Criteria for use of the infrastructure in the non-processing area set as under :

i. Residential Houses :

a. 75% to be used by employees at the SEZ

b. 25% can be used by any other persons

ii. Hotels & Schools etc.:

a. 50% to be utilized by people within the SEZ

b. 50% can be used by any other persons

These additional conditions raise a whole new set of questions. How is this going to be monitored? If an employee in the SEZ acquired a house in the SEZ, and subsequently leaves the SEZ employer for one located outside the SEZ, is it expected that the authorities in the SEZ would compel him to part with his house so as to meet with the 75:25 requirement?

No Income-tax exemption to units on Relocation

Existing IT units in the Domestic Tariff Area not to qualify for income tax benefits if they chose to relocate to any of the SEZs.

This raises the issue of how will the restriction on migration/ relocation be monitored? Further, on one hand, Income-tax Act gives exemption on capital gains tax u/s. 54GA on relocation of an existing unit to SEZ, on the other hand, migration / relocation from DTA / EOU / STPI to SEZ is not favoured by the EGoM.

MAT exemption only on "export profit"

Like income-tax exemption, units in the SEZ shall be exempt from paying Minimum Alternate Tax (MAT) only to the extent of "export profits" (profit derived from physical export of goods and services from the SEZ).

Minimum Processing area of Multi-Product SEZ

Minimum Processing are for Multi-Product SEZs have been increased from existing 25% to 50%. For sector specific SEZs, the minimum processing area is already at 50%.

The EGOM was constituted to address various criticisms that were levelled against the policy. That it seeks to create enclaves of fiscal freedoms while the large majority of existing industrial and manufacturing units will continue to languish under heavy tax burdens, tied-up with bureaucratic red-tape, thereby creating a dubious distinction of having innovated the principle of First-Mover-Disadvantage. That the SEZ policy will result in industrial growth coming in the Domestic Tariff Area coming to a stand-still, with all future growth converging into the SEZs. That existing units in the Domestic Tariff Area would shut shop only to re-invent themselves in new avatars as SEZ units. The list goes on…

There is no denying that there is a grain of truth in each of these criticisms. But that did not justify tarring the entire policy with one brush. No policy or piece of legislation can ever be perfect, and the benchmarks used to judge such initiatives have to be based on the reality check of what is possible. The intentions of the policy are noble, and the means that have been identified to implement them seem workable. Overall, it seems a policy that will be immensely successful. While it is too early to comment on how much of this success will eventually be seen on the ground, and extent of economic development that will result, initial indications are very encouraging. The large number of applications being filed for setting up SEZs is a clear testimony of the extent to which this policy has excited interest in the business community of India, and of investors from abroad.

In any case, this is a new initiative. Every policy initiative evolves over time. Problems that are identified when the policy starts getting implemented have to be addressed as the process moves forward. In this case, the constitution of the Group of Ministers so soon after the policy was announced, and before its provisions could even be tested on the ground, combined with the radical changes that are being proposed pose a real risk of frittering away the tremendous interest in the SEZs.

The interest in SEZs has been tremendous. Let us not lose all this by rapid and frequent twists and turns in policy. It is hoped that the honourable ministers, while deliberating on the issues before the, will focus on the woods, and not on individual trees.

Remembrance of RRC of WRC at Mahabaleswar in April 2006

Mr. P. Kaka, Mr. P. Desai, Mr. T.P. Ostwal, Mr. P. Sayta, Mr. S. Lala

Ms. Tara Rao, Mr. Kaushal Kapadia, Mr. K. Dave

JUDICIAL DEVELOPMENTS

RECENT INTERNATIONAL CASE LAWS

A. BY INDIAN COURTS

... By Pranav Sayta

1. Morgan Stanley and Co. in Re (2006) 201 CTR 67 (AAR)

The applicant was an investment bank incorporated in USA. MSAS, a wholly-owned subsidiary of the applicant group, incorporated in India, had entered into an agreement with the applicant to provide support services. The applicant had undertaken to send staff to MSAS, for stewardship and other similar activities to ensure that the high standards of quality are met as Morgan Stanley group entities are to be satisfied that the services received by them from other group companies meet the Morgan Stanley standards. The applicant's staff is also sent on deputation on the request of MSAS for periods ranging between several months to a couple of years to work under its control and supervision. Salary costs of employees deputed was to be initially paid by the applicant and would be onwards recharged to MSAS. Salary costs of employees sent to India for stewardship activities were borne by the applicant. For services rendered to the applicant, MSAS charged the applicant on cost plus mark up basis.

Ruling was sought from the AAR as to, *interalia*:

- Whether applicant would be regarded as having a PE in India under Article 5 of the India- USA DTAA[1]?
- Whether MSAS, could be considered as dependent agent PE of the applicant under Article 5(4) of the DTAA?
- Whether applicant would be considered as having service PE under Article 5(2)(l) of the DTAA?
- Even in the event MSAS constitutes a PE of the applicant in India, as long as MSAS was remunerated at arm's length for its services, whether any further income could be attributed to the PE of the applicant?
- Whether Transactional Net Margin Method ('TNMM') is the most appropriate method for the determination of the arm's length price in respect of the transactions between the applicant and MSAS?

The AAR held that MSAS cannot be regarded as a fixed place PE of the applicant since there was nothing to show that the business of the applicant was carried on through the place of business of the MSAS.

Though MSAS was acting in India on behalf of the applicant, there was no material to show that MSAS was habitually exercising an authority to conclude contracts, maintaining stock of any goods or securing orders in India for the applicant. Therefore, MSAS cannot be considered as a dependent agent PE of the applicant under Article 5(4) of the DTAA.

However, MSAS would constitute service PE of the applicant, since once the applicant would send staff on deputation for stewardship activities, they would be actively involved in the key managerial activities of MSAS. The AAR did not accept the argument that the staff would be working for the applicant only and hence there should not be a service PE. According to the AAR, while the benefit of the services of the staff may enure to the applicant, that would not be the same as the staff working for the applicant, and hence according to the AAR, all ingredients of Article 5(2)(l) were satisfied and MSAS would constitute PE of the Applicant.

AAR concluded that as long as MSAS, being the PE of the applicant, is remunerated for its services at arm's length by the applicant, no further income can be attributed in the hands of the PE of the applicant.

AAR rejected the question regarding TNMM method on account of the following:

- The question was already pending before an income tax authority.
- It involves determination of the fair market value of property.

2. ADIT v Green Emirate Shipping and Travels (2006) 99 TTJ 988 (Mum.)

The assessee, a resident of UAE, was in the shipping business. The assessee claimed, in terms of Article 8 of the India - UAE DTAA, that its income was liable to tax only in UAE, i.e. the country of domicile. The AO[2] rejected the claim of the assessee on the ground that assessee was not paying any taxes in UAE and hence the provision of the DTAA does not apply to him. The Commissioner of Income Tax (Appeals) observed that the assessee had furnished the copy of the tax residency certificate, and, directed the AO to allow the benefit of the DTAA to the assessee.

The Tribunal upheld the conclusion derived by the Commissioner of Income Tax (Appeals) but did not approve of the reasoning adopted by him. The Tribunal relied on the decision of Supreme Court in case of *Union of India v Azadi Bachao Andolan (2003) 263 ITR 706 (SC)* and held that a tax treaty not only prevents 'current' but also 'potential' double taxation. It is not possible to accept that the avoidance of double taxation can arise only when tax is actually paid in one of the contracting States. Taxability in one country is not sine qua non for availing relief under the DTAA from taxability in the other country.

1 DTAA refers to Double Tax Avoidance Agreement

2 AO refers to the Assessing Officer

It is necessary that the person should be 'liable to tax, in the contracting state by reason of domicile, residence, place of management, place of incorporation or any other criterion of similar nature, which essentially refers to the fiscal domicile of such person. If fiscal domicile of a person is in a Contracting State, he is to be treated as resident of that contracting state, regardless of whether or not that person is actually liable to pay tax in that country. 'Liable to tax' in the Contracting State does not imply that the person should actually be liable to tax in that Contracting State by virtue of an existing legal provision but would also cover the cases where the other Contracting State has the right to tax such persons, whether or not such a right is exercised by the Contracting state.

The Tribunal refused to follow the ruling given in *Cyril Eugene Pereira , In re (1999) 239 ITR 650 (AAR)* and held that the said ruling has been clearly disapproved in the case of *Union of India v Azadi Bachao Andolan (2003) 263 ITR 706 (SC).*

The Tribunal also did not follow the AAR ruling in case of *Abdul Razak A. Menan (2005) 276 ITR 306 (AAR)*, and held that the ruling is not even binding on the Commissioner of Income Tax and the authorities subordinate thereto in any case,except in case of that very assessee in which such ruling is given and even in such a case it is binding only in respect of the transaction in respect of which the ruling is given.

3. Metchem Canada Inc. v DCIT (2006) 99 TTJ 702 (Mum.)

The assessee, a company incorporated in Canada, having PE in India had claimed a deduction in respect of allocation of overhead expenses incurred by the head office, and claimed that in light of the provisions of Article 24 (Non discrimination) of the India – Canada DTAA, section 44C of the Act would have no application. The AO rejected the plea of the assessee on the ground that as per the provisions of Article 7(3) of the DTAA, the profits of the PE are to be computed in accordance and subject to limitations of the taxation laws in India, and therefore the limitation set out in section 44C could not be ignored. The Tribunal held that restriction placed on the allowability of the head office expenses under section 44C is to be ignored and the assessee is to be allowed deduction of head office expenses as can be fairly allocated to the PE. The Tribunal observed the following:

- Section 44C, which is not applicable in the case of resident companies does constitute less favourable tax treatment to PE of the Canadian company as compared to Indian companies carrying on same activities in India and accordingly, is convered by the non-discrimination clause of the DTAA. The Tribunal reached this conclusion based on the OECD Commentary to the Model Convention and also on a plain reading of the provisions of Article 24(2).
- The provisions of Article 24 are specific provisions whereas the provisions of Article 7 are in the nature of the general provisions. Hence, provisions of Article 7 are required to be read as subject to the provisions of Article 24.
- Further, whenever the provisions of the Act and the DTAA are in conflict, the provisions of the Act are applicable only to the extent the same are more beneficial to the assessee. Hence, the provisions of the DTAA prevail over the provisions of the Act.
- Section 44C is in the nature of disallowance provision which puts a ceiling on the admissibility of a deduction. It does constitute restriction and a restriction which is not similarly placed for a domestic enterprise. The head office expenses, to the extent the same can be fairly allocated to the PE are admissible as deduction under section 37(1).

Accordingly, the Tribunal held that in view of the non-discrimination clause, the scope of deduction under section 37(1) will not stand curtailed by the restriction placed under section 44C of the Act.

4. Mrs. Prema R Shah & Mr Sanjiv V Shah v ITO (2006) 282 ITR (AT) 211 (Mum.)

The assessee, a non resident Indian, sold a residential property in India and invested certain amounts in shares and deposits with private parties The assessee claimed exemption under section 54 of the Act based on investment in acquiring a residential property in London. AO disallowed assessee's claim on the following grounds:

- The assessee had not used the sale consideration to purchase the said property and instead had taken loan from the bank
- The assessee had purchased only tenancy rights in the lease property.
- Further, to claim exemption under section 54 the property purchased should be in India itself.

The Tribunal allowed the assessee's appeal and held, that,

- It was not necessary that the same amount received on sale, should have been utilized for the acquisition of the new asset.
- Considering *inter alia*, that the lease was valid for 150 years, which was in perpetuity, the assessee was as good as the absolute owner of the property,
    - If all other conditions of section 54 were satisfied, merely because the property acquired

was in a foreign country, the benefit under section 54 cannot be denied to the assessee.

5. Heinrich De Fries GmbH v JCIT (2006) 98 ITD 292 (Mum.)

The Assessee, a non-resident company, supplied know-how and machinery to an Indian company and also granted a license to the Indian company for manufacture of hoists. In consideration for this, the assessee was allotted shares in the Indian company. The costs incurred in supply of know-how, machinery and license fees were incurred in Germany and in German currency. Further, assessee was allotted bonus shares, in 1975, 1979 and 1985. All the shares were sold by the assessee. Assessee contended that the capital gain should be computed as per first proviso to section 48 of the Act but the same was rejected by the AO.

Before the Commissioner of Income Tax (Appeals), the assessee also raised a new plea that for the bonus shares issued before April 1, 1981 the cost of acquisition was to be taken at the fair market value as on April 1, 1981.The Commissioner of Income Tax (Appeals) held that the first proviso to section 48 would be applicable to the original shares. However he rejected the substitution of fair market value as on April 1, 1981 for bonus shares acquired prior to April 1, 1981.

The Tribunal held that proviso to section 48 would be applicable and, that, in concluding that the currency utilized for purchase of shares was Indian currency, the AO lost sight of the fact that what is cost of acquisition for the assessee is not the consideration of supplying technical know-how and machinery, etc. stated in the contract but the costs incurred by the assessee in executing the contract.

In respect of the bonus shares allotted prior to April 1, 1981, the Tribunal held that for computation of capital gains, cost of acquisition was to be taken as fair market value as on April 1, 1981 and for remaining bonus shares, cost was to be taken as nil.

6. JCIT v Warner Brothers (FE) Inc. (2006) 282 ITR (AT) 90 (Mum.) (SB)

Assessee, a non-resident company, along with other non-resident companies was member of the Motion Pictures Association of America ('MPA') and was engaged in the business of distribution of foreign films in India on behalf of another non-resident company. All the member companies had been carrying on distribution/exhibition of foreign films in India. As there were practical difficulties in completing the assessment, CBDT after extensive research and approval of the Government as a policy matter, issued a letter dated F. No. 485/2/85-FTD ('settlement') dated March 3, 1987. The 'settlement' provided that assessments in case of the member companies of MPA would only be made on a designated member company and the taxable income of the member companies would be determined on a presumptive rate of 25 per cent of gross film receipts from operations in India. The assessments of the assessee company up to assessment year 1993-94 were completed on the basis of the said 'settlement' but the income-tax authorities declined to make the assessment for the later years on the basis of the 'settlement' on the ground that the 'settlement' applied only up to March 31, 1987. However, the Tribunal held that the income has to be computed in accordance with the 'settlement' even for AY 1994-95.

The Special Bench noted that the Regular Bench of the Tribunal had held in the following cases that the 'settlement' continued to govern the assessments even after March 31, 1987:

- Columbia Picture Industries Ltd. (ITA No. 1145 and 3532/Cal/91 and CO Nos. 21 and 22/CAI/92 Dt. 25-5-1998-AY 1987-88 and 1988-89)
- Columbia Picture Industries Ltd. (ITA No.3316/Bom/95 Dt. 25-2-2003-AY 1992-93)
- Columbia Picture Industries Ltd. (ITA No. 100/Mum/99 Dt. 17-9-2003-AY 1994-95)
- Warner Bros (FE) Inc. (ITA No. 1668/Mum/98 Dt. 7-5-2003-AY 1994-95)
- JCIT v 20th Century Fox International Corporation (ITA Nos.1997, 1998 and 1999/Mum/1999 Dt. 12-11-2003 AY 1993-94 to 1995-96)

It was also noted that the Tribunal in the case of JCIT v Columbia Picture Industries Ltd. for the AY 1995-96 in ITA No. 6557/Mum/98 Dt. 23-10-2003 had held that the 'settlement' would not be applicable for the period subsequent to March 31, 1987.

The Special Bench held that principles laid down in the 'settlement' were to be followed for assessments even after March 31, 1987 for the following reasons:

- Since circumstances which prompted CBDT to pronounce the 'settlement' dated March 3, 1987 continued till date and no better alternative for completing assessments of member companies of MPA had been worked out by the competent authorities.
- The various benches of Tribunal, as mentioned above, had decided the matter in favour of the assessee even after considering the subsequent clarification of the Board that the said 'settlement' would not be applicable for cases of assessments falling for the period beyond March 31, 1987.
- The Special Bench observed that even after the technical termination of the settlement after March 31, 1987, the department is continuing to apply the

settlement in a partial manner as far the first limb of the settlement is concerned. Therefore, the Special Bench held that the termination of the settlement for the period after March 31, 1987 was only a technical deliberation.

- The 'settlement' assumed the role of a rule based on the consistent method followed by the Revenue Department of computing the income as per the said settlement. Thus, the revenue was estopped from disowning principles of 'settlement', particularly when in many cases assessments of the member companies of MPA had been completed by department on the basis of the 'settlement'
- Further, the said 'settlement' should be accepted as a practical way of collecting taxes from non-resident companies engaged in the film distribution in India.

7. McKinsey & Co. Inc. (Philippines) v ADIT (2006) 99 ITD 549 (SMC) (Mum.)

The assessee companies were residents of the USA and these companies did not have a PE in India. The assessee companies supplied certain geographical specific data and information inputs to the Indian branch office of McKinsey Inc. which was engaged in the business of providing strategic consultancy services to its clients in India. The AO held that

- The services rendered by assessee were fees for included services under Article 12(4) of the India-USA DTAA.
- The AO also contended that the expression 'make available' would mean the person providing the service merely enables the acquirer to use knowledge and the provider does not participate in the act of doing job himself.

The Tribunal observed that the issue raised by the AO was that if non-technical services are to be excluded from the scope of Article 12(4)(b), the scope of Article 12(4)(b) will be rendered redundant in the sense that the scope of Article 12(3)(a) will be the same as that of Article 12(4)(b). The Tribunal held that so far as Article 12(3) is concerned, the role of the assessee is non-participative or passive.

In Article 12(4) the role of the assessee is participative or active, in the sense that 'rendering of services' is the basic precondition for application of Article 12(4).

The scope of these two provisions are thus mutually exclusive and clearly distinct— Article 12(3) deals with the consideration for granting use or right to use certain physical or intellectual properties, whereas Article 12(4) deals with rendering of technical or consultancy services under certain specific conditions.

The Tribunal held that the consideration received for supply of information by the appellant companies, could not be treated as 'fees for included services' and was not liable to be taxed in India under Article 12(4) of the DTAA. The Tribunal relying on the MOU to the DTAA held that technology would be considered 'made available' when the person acquiring the services is enabled to apply the technology. Further consultancy services of a non-technical nature are not taxable under Article 12(4) of the DTAA. Geographical specific data and information inputs supplied by the appellant companies were in the nature of commercial and industrial information and there was no material to suggest that such services enable the recipients of these services to apply the technology.

B. BY FOREIGN COURTS

... By Ketan Dalal

1. Wood and Another v. Holden (Inspector of Taxes) [2005] EWHC 547 (Ch)

Wood and his wife, through trustees of number of settlements, held the entire shares of CIL, a company incorporated in British Virgin Island. Another company, Holdings, was incorporated where Wood and his wife were the shareholders. 49% of these shares held by wood and his wife in Holdings were transferred to CIL. Later CIL purchased all shares in Eulalia, a Dutch company. AA Trust, resident in Geneva, was appointed as sole managing director of Eulalia. Subsequently, CIL disposed shares held in Holdings to Eulalia and after that Eulalia sold these shares to third party.

The common ground was that the gain on disposal of shares by CIL was assessable on Wood and his wife. Revenue assessed capital gain tax on the ground that Eulalia was resident of UK as its central management and control was exercised by Wood or on his behalf while CIL was non resident in UK. Revenue contended that AA Trust in Netherlands did not take the decisions but merely acted on behalf of Wood. Wood and his wife appealed against the assessment contending that both CIL and Eulalia were non residents and no gain accrued on transactions between two non resident groups. However, Special Commissioner dismissed the appeal holding Eulalia as resident of UK.

On further appeal it was held that there was no evidence indicating that Eulalia was controlled otherwise than by AA Trust. Without decisions by AA Trust in its capacity as managing director of Eulalia to enter into the agreements to purchase and sell shares, agreements would not have been made. AA Trust itself took those decisions, although on the recommendation of professional accountants in UK. There is no evidence to prove that the UK based accountant had dictated their decisions. The Court of appeal finally held that Eulalia was resident in Netherlands as, on the common law test central management and control was not in UK.

2. Marks & Spencer v. Halsey (HM Inspector of Taxes) (C-446/03)

Marks & Spencer, a company resident in the UK, had established subsidiaries in Belgium, France & Germany that were held by an intermediary company established in the Netherlands. In the period 1998-2001, it incurred enormous losses and wanted to withdraw from the non-UK market. However, it wanted to transfer the losses of the foreign subsidiaries to the UK parent company.

European Court of Justice (ECJ) observed that UK treats a resident parent company having a resident subsidiary differently from a resident parent company having a non-resident subsidiary. In the latter case the parent company is not entitled to set off foreign losses against its domestic profits. This difference in treatment is, in principle, incompatible with the freedom of establishment within EU.

However, ECJ agreed that a distinction could sometimes be justified. This would be the case if the incompatible infringement of a freedom guaranteed by the EC Treaty resulted in the offsetting of losses more than once. The taxpayer must prove that a transferable loss cannot be taken into account more than once. The ECJ seems to compare the internal market with a domestic market. The same principle should be applied within the European Union because it is to be expected that no Member State permit losses to be deducted more than once.

The ECJ concluded its decision by explicitly stating that the Member States are still entitled to introduce specific anti-abuse provisions to prevent abuse by companies in situations where companies claim that they cannot deduct certain losses twice but actually structure the group companies in such a way as to take a double deduction. Hence, the losses in present case can be allowed if the appellant can prove that these losses were not set off in the respective countries where these subsidiaries operated.

3. National Westminster Bank Plc. v. United States, No. 95-758T (Fed. Cl. Dec. 16, 2005)

Taxpayer, a UK bank – had operations through 6 branches in the USA. The New York branch bore overhead expenses for other co-located branches. Each branch maintained separate books of record and the taxpayer filed a single US tax return for a single Permanent Establishment (PE).

Revenue claimed that the assessee's operations needed to be treated as six different PE's. Revenue also claimed that each branch needed to be allocated capital by taxpayer to cover its economic risk and to cover losses made by the particular branch. Assessee applied for summary judgment on these issues.

According to the court, the fact that the six offices maintained separate books and records for internal accounting purposes did not mean that the offices were not part of a single PE. The court found that the service did not identify a single situation in which it had treated a foreign taxpayer as having multiple PE's.

Further, it was held, based on opinions of the experts that filing of tax returns on an "aggregate" basis is a norm of a foreign corporation having operations in a host country. Thus, it was held that there was only one PE and not six.

The court further held that taxpayer was not obligated to identify an amount to be treated as allotted capital to account for economic risk posed by the activities conducted by the US branch. Further, the court rejected the contention on fixed assets and held that the taxpayers factual position did not need it to trace the assets, as no interest was paid on capital allocated for the assets. It was held that it was not the task of the Revenue to identify the amount of capital, which had in reality been given to the branch. Further, that a UK bank with a branch in the USA was under no regulatory requirement to provide capital to the US branch.

Finally, it was held by the court that the books and records were accurate and reliably maintained and that the Revenue could not prove anything on fact in this regard. Thus, there was no requirement to account for losses in a single branch and transfer capital to that particular branch.

4. McDermott Industries (Aust) Pty Ltd v. Commissioner of Taxation 7 ITLR 800 (Federal Court Of Australia (Full Court)

The taxpayer was an Australian company, which leased barges from a company in Singapore for use in Australian waters. The charter fees were paid pursuant to various lease agreements entered into between them. The barges were leased on bare boat charters but they were not 'ship' for the purpose of the Australia-Singapore Tax Treaty.

The charter fees paid were disallowed by the Commissioner on the grounds that the payment was non-deductible as the person paying the royalty (MIA) had not withheld an amount equal to the withholding tax liability of the non-resident.

The question before the court was whether withholding tax was payable on the royalties paid by the Australian company to Singapore company. So it was necessary to know if Singapore company had a PE in Australia by virtue of barges, which were considered as substantial equipment, being used in Australia.

It was observed that pursuant to Article 10(4) which provided that withholding tax is not payable if a royalty is paid to a resident of the other state and the information, right or property giving rise to the royalties is effectively connected with a trade or business carried on through that PE.

The Court held that the Singapore company had PE by virtue of Article 4(3) which provided that an enterprise will be deemed to have a PE if substantial equipment is being used in that other State by, for or under contract with the enterprise. The PE was deemed to arise because the barges in question, being admittedly substantial equipment, were being used in Australia.

Hence, the charter fees were not to be taxed by withholding as royalties but by application of ordinary provision as business income in the hands of Singapore company. Therefore, the charter fees paid by the Australian company were to be allowed as deduction.

5. Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) 7 ITLR 383 (UK-House of Lords)

Barclays claimed writing-down allowances in respect of purchase of plant and machinery for the purposes of its finance leasing trade.

The Special Commissioner dismissed BMBF's appeal, holding that the purpose of the expenditure by Barclays was not the acquisition of the plant and machinery but the obtaining of capital allowances.

The Court of Appeal allowed BMBF's appeal holding that the expenditure had been incurred by BMBF wholly and exclusively for the purposes of its trade of providing asset-based finance.

The House of Lords allowed the claim for capital allowances made by the UK company in respect of its expenditure on acquisition of the plant & machinery from a non-UK company and leased back to it. It held that all the requirements of the relevant legislation were satisfied, since the UK company had acquired the plant & machinery for the purpose of its financial leasing trade and the circularity of the payments were not necessary element in creating the entitlement to the capital allowances.

Remembrance of RRC of WRC at Mahabaleswar in April 2006

Mr. S. Lala, Mr. S. Lakhani, Mr. Keyur Shah

Mr. Nishant Shah

Mr. Keyur Shah

Mr. Kenny Lim yeow hua from Singapore

GLOBAL TAX UPDATE

GENERAL CORPORATE TAX RATES OF VARIOUS COUNTRIES

...Compiled by Sharad Jain & Digesh Rambhia

Country	2005 (%)
Albania	25
Argentina	35
Australia	30
Austria	25
Bangladesh[1]	30/37.5/45
Barbados	30
Belgium[2]	33
Belize	25
Bolivia	25
Botswana	25
Brazil[3]	15
British Virgin Island	15
Brunei Dares salaam[4]	30/55
Bulgaria	15
Canada[5]	22.12/39.12
Cayman Islands	0
Chile	17
China	33
Colombia[6]	35
Congo	38
Costa Rica[7]	30/20/10
Cote D Ivoire	35
Croatia	20. 32
Cyprus	10
Czech Republic[8]	26
Denmark	30
Dominican Republic	25
Ecuador[9]	25
El Salvador	25
Ethiopia	30
Fiji	31
Finland	26
France	33.33
Gabon	35
Germany[10]	25
Greece	35
Guatemala[11]	5 / 31
Honduras[12]	25
Hong Kong	17.5
Hungary	16
Iceland	18
Indonesia[13]	30
Ireland[14]	12.5/25
Isle of Man[15]	10/15/18
Israel[16]	34/32/30
Italy[17]	33
Japan	41
Jamaica	33.33
Jordan	35
Kazakhstan	30
Kenya	30
Korea, Republic of	25
Kuwait	55

1 Publicly Traded Companies – 30%, Bank, Insurance and Financial Institution – 45%, Others – 37.5%
2 Additional 3% surtax imposed
3 Additional surtax of 10% leviable if taxable profits exceeds R$240,000
4 General Rate – 30%, Petroleum Income Tax Rate – 55%
5 Taxed by federal government and by one/more provinces and hence tax varies from 22.12% – 39.12%
6 10% additional surcharge imposed
7 Turnover < ¢21,468,000 – 10%, between ¢21,468,000 to ¢43,183,000 – 20% Above ¢43,183,000 – 30%
8 W.E.F. 2006 tax rate – 24%
9 Corporate Income Rate on Reinvested amount – 15%
10 Additional 5.5% surcharge is imposed
11 General Withholding Tax Regime – 5% and Optional Tax Regime – 31%
12 Additional 5% levied till the year 2006 towards Social Contribution Tax
13 Maximum progressive rate
14 Trading Income – 12.5% and Non Trading Income - 25%
15 Trading Income upto £100 – 10%, Trading Income above £100 – 15% and Investment Income – 18%
16 Year 2005 – 34%, Year 2006 – 32% and Year 2007 – 30%
17 In addition, regional tax imposed on manufacturing Co – 4.25%, on Commercial Public Entities – 8.5%

General Corporate Tax Rates of Various Countries (Contd.)

Country	2005 (%)
Latvia	15
Lithuania[18]	15/13
Luxembourg[19]	22
Macau	15
Malaysia[20]	28/38
Malta	35
Mauritius	25
Mexico[21]	30
Moldova	18
Mozambique	32
Monaco[22]	35/39.6%
Myanmar	30
Namibia	35
Nepal[23]	25/30
Netherlands[24]	27%/31.5%
Nigeria	30
New Zealand	33
Norway	28
Oman[25]	12/30
Pakistan[26]	41/35/39
Panama	30
Papua New Guinea	30
Paraguay[27]	30/20/10
Peru	30
Philippines	32
Poland	19
Portugal[28]	25
Romania	16
Russia[29]	20/24
Singapore	20
Slovak Republic	19
Slovenia	25
South Africa[30]	30/35
Spain	35
Sri Lanka	30
Sudan	35
Sweden	28
Switzerland[31]	14 to 30%
Syria	35
Taiwan	25
Tanzania	30
Thailand	30
Trinidad and Tobago[32]	30/35
Tunisia	35
Turkey	30
Uganda	30
Ukraine	25
United Arab Emirates	0
United Kingdom	30
United States	35
US Virgin Island	38.5
Uruguay	30
Uzbekistan	18
Venezuela	34
Vietnam[33]	28/50
Yemen	35
Zambia[34]	15 to 45
Zimbabwe	30

18 13% rate applies to small companies having income<LTL 500,000 and Avg. Employees<10
19 Additional surcharge 4% and Municipality Tax Avg. – 7.5%
20 General rates – 28% and Petroleum Companies – 38%
21 For 2006 – 29% and 2007 – 28%
22 Banks, Financial institution and Insurance Company – 39.6%
23 Banks, Financial institution and Insurance Company – 30%
24 Tax rate 27% applies to the first • 22,689 of taxable income
25 Maximum Rate of tax on Branch of foreign Cos. – 30%
26

Year	Public Co	Private Co	Banking Co
2005	35	39	41
2006	35	37	38
2007	35	35	35

27 2005 – 30%, 2006 – 20%, 2007 and further – 10%
28 In addition, Municipal Surcharge – 10%
29 Basic Central Rate – 5% plus tax levies by regional government ranges between 13% to 17%
30 Basic Rate – 30% and Branch Profits tax – 35%
31 Comprises of Federal, cantonal and communal taxes
32 General – 30, Petrochemical and related sectors – 35%
33 General – 28%, Petroleum and Mining Co – 50%
34 Tax rates varies sector wise

ANNEXURES

ANNEXURE 1:

Joint session of India-USA IFA branch

Topics and the faculties were as follows:

1. India economic update and trends – Mr. Adit Jain, IMA

2. Comparative Discussion of Key Aspects of the Indian and US Tax Systems Both from a Structural and Administrative Standpoint - Moderator: S E Dastur, Sr. Advocate

USA: Pam Olson, Skadden Arps, Slate, Meagher & Flom LLP

India: Dr P Shome, Advisor to FM, Gaurav Taneja, Ernst & Young, Sudhir Kapadia, KPMG

3. Transfer Pricing Part I - Moderator: Mukesh Butani, BMR & Associates

USA: Carol Dunahoo, Baker & McKenzie LLP, Bob Green, Director, International, LMSB, IRS

India: Srinivasa Rao, Ernst & Young, Rupak Saha, GE, V.K. Mangotra, Director of Income Tax, Indian Revenue Service, Porus Kaka, Advocate

4. Transfer Pricing Part II - Moderator: Shyamal Mukherjee, PwC

USA: Steven Hannes*, McDermott, Will, & Emery, Sam Maruca, Miller & Chevalier Chartered

India: Samir Gandhi*, Deloitte Haskins & Sells, H Srinivasalu*, Commissioner of Income Tax, Indian Revenue Service

5. India-US Tax Treaty Part I – Tax Considerations of Investments & Acquisitions in India

Moderator: Jim Tobin, Ernst & Young LLP

USA: Simon Beaumont*, IBM, Jim Fuller*, Fenwick & West LLP

India: Shefali Goradia, Nishith Desai &Associates, Rupesh Jain, Vaish Associates, Ketan Dalal, RSM & Co

6. India-US Tax Treaty Part II – Mutual Agreement Procedures

Moderator: Ajay Vohra, Vaish Associates

USA: Peter Barnes*, General Electric Company, Charles Cope*, KPMG LLP, John J Merrick*, Special Counsel to the Associate Chief Counsel (International)

India: Dinesh Kanabar, RSM & Co, P V Srinivas*, Wipro, Pramod Kumar*, Accountant Member, ITAT

7. Indirect Taxes – Customs Duties/Trade Agreements, VAT in India – Features and Impact on Supply Chain, Service Tax – Kaleidoscopic View.

Moderator: Gautam Doshi, ADA Enterprises

USA: Jim Fitzgerald, Dell, Peter Zubrin, GM's Regional Customs Counsel for Asia/Pacific

India: S Madhavan, PwC (VAT), Rajeev Dimri, BMR & Associates (Service tax), R A Sridhar, GSK (FTA's)

8. Recent Treaty Trends - Moderator: Roger Wheeler, General Motors Corporation

USA: Jeffrey Levenstam, Ernst & Young LLP, Phil West, Steptoe & Johnson LLP

India: Sanjiv Chaudhary, KPMG, Vijay Mathur, MPC Consultants Pvt Ltd, Indian Revenue Service (Retd.)

Singapore: Gurbachan Singh, KhattarWong & Partners

9. Tax Challenges - Financial Service Industry - Moderator: Bobby Parikh, BMR & Associates

USA: Oscar Teunissen/Puneet Arora, Price water house Coopers LLP, Lawrence Zlatkin*, GE Corporate Tax

India: Sunil Kothare, Citibank, Girish Dave, Indian Revenue Service

Mauritius: Uday Gujadhar, Multiconsult

Remembrance of RRC of WRC at Mahabaleswar in April 2006

Mr. Sharad Jain & Mr. T.P. Ostwal

Ms. Bijal Ajinkya

ANNEXURE 2:

2nd Residential Refresher Course

from 8th April to 11th April 2006 at Hotel Dreamland

...Report By N. K. Bhat

The second Residential Refresher Course of WRC of IFA was held in the sylvan surroundings at Mahableshwar. The excellent spade work done by the organizers was visible from the word go. Delegates with their spouses arrived and were served delicious welcome drink at the venue. Arrangement for their stay and allotment of rooms was done without any waiting.

The Programme was well planned covering relevant and diverse topics on international Taxation with Group Discussion on the following papers

— Credit of Taxes and withholding of Taxes – cross border issues (Sushil Lakhani)

— Service Tax on International Transactions (Nishant Shah)

— Structuring of outbound Investments (Shri T. P. Ostwal and Sharad Jain)

There was lively Group Discussion with participants giving valuable inputs. Paper writers gave their views and clarified the issues raised Learning was at three levels, first when the delegates read the papers themselves, later at the Group while participating and at last when the paper writers made their presentation clearing all the issues and settling them to the full satisfaction of the delegates.

There was lively Panel discussion of case studies on diverse and complex issues ably discussed by the panel of experts namely Shri Pinakin Desai, Shri Pranav Sayta and Shri Porus Kaka. Case studies covered issues on cross border investments, taxation of payment for software, accessing the treaty, turnkey project issues with reference to implications u/s 44BBB, taxation of specialist equipment, issues on PE, covering fixed place of business, service PE and Agency PE, taxability of payment of interest to and from branch. There was lively participation from the floor. The participants had the benefit of the vision of the panelists and the participants. It was virtually a brainstorming session and thinking done out of the box and not treading the beaten track.

There were presentations on the following topics: Recent OECD Developments by Keyur Shah and Recent International judicial decisions by Bijal Ajnkeya, Singapore Tax System – Kenny Lim Yeow Hua from Singapore. Once again the delegates participated sharing their views and enhancing the utility of the presentation.

It was evident that knowledge is vast and without boundaries and the joint participation helps in pooling and harnessing it.

There was excellent time management. Poof of it was evident as the Inauguration of the Conference and response to paper- I which were combined after the Group Discussion, killing two birds in one stone.

Delegates were busy all through in deliberations, while their spouses were enjoying the salubrious environs of Mahableshwar. Out of the packed programme delegates suddenly found to their pleasant surprise that they had a long spell of free time from 2 p.m. to 8 p.m. on Monday (10-04-06). Whatever they had missed in Mahableshwar for 3 days they made good. This was not so for the group and paper writers who had to deliver on the final day on "Structuring Outbound Investments". While their companions slept they were seen burning midnight oil. It was a treat at the Panel Discussion on the 12th on Structuring Outbound Investments. There was pin drop silence as T P Ostwal and team, analysed, synthesized and explained the various alternative and acceptable approaches to structuring outbound investments. Participation from the floor was always there and it was lively and constructive.

The RRC had all the characteristics of international conference though held in local setting. The organizers received accolades for their untiring efforts and imaginative planning and proper implementation. When delegates continued to still occupy their seats, organizers politely reminded them that it was time for lunch and thereafter to bid adieu to the venue. Delegates were seen leaving reluctantly with a heavy heart. Thus ended the 2nd RRC of WRC IFA-Happily.

Remembrance of RRC of WRC at Mahabaleswar in April 2006

Mr. Nishant Shah, Mr. Nilesh Kapadia, Mr. Tarun Singhal

Seminar by Hyderabad Sub-Chapter

Mr. T.P. Ostwal, Mr. P.V.S.S. Prasad, Mr. V. Jawahar

Joint Executive Committee meeting of India & US Branch

Mr. P.V.S.S. Prasad, Mr. Rahul Garg, Mr. Pradip Bhandari

Mr. Mukesh, Mr. K. Dave, Ms. Carol Donahoo, Mr. O.P. Vaish

Mr. O.P. Vaish, Mr. Ajay Vohra, Mr. Sanjeev Choudhary, Mr. Ketan Dalal, Mr. Jim Jobin

Mr. O.P. Vaish Conference Chairman addressing the gathering

Mr. Adit Jain speaking on India Country Update

IFA - Joint Conference with US Branch

Mr. Mukesh Butani, Mr. D.P. Sengupta, Mr. Jim Tobin, Mr. Roger Wheeler

Mr. Parthsarthy Some Advisor to Finance Minister of India addressing the Gathering

From the dais of IFA - India - US Joint Conference

People who organised the IFA-conference at Delhi

Seminar by Hyderabad Sub-Chapter

Mr. P.V.S.S. Prasad, Mr. V. Jawahar, Mr. R. Murlidharan Member IRDA

Mr. Roger Wheeler, Prof. Jean-Pierre Le Gall, Mr. Mukesh Butani

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