IFA News Letter
India Branch - Western Chapter

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Chairman Speaks

It is indeed a matter of great honor to have been given the responsibility to Chair the Western Region Chapter, of The International Fiscal Association, India Branch. I look forward to working with the outstanding team we have at IFA and hope we are able to build further on the illustrious reputation built by IFA over the years.

As we go about nurturing thought leadership, sharing knowledge & experiences and discussing various aspects in the field of International Tax, we hope this Newsletter carves out a unique niche & character of its own.

We have indeed been privileged to have the best minds in the field of International Tax guide us through various developments at very short notice and I am extremely grateful to each one of them. We were fortunate to have had the privilege of a dream team Chaired by Shri Soli Dastur, analysing & discussing the implications of the Supreme Court judgment in Vodafone's case, through a panel discussion, within a fortnight of the judgment being pronounced. Once again we had an illustrious team taking us through the proposed amendments relating to International Tax in a half day seminar within a fortnight of the Budget chaired by Mr. Y. P. Trivedi. Thanks to the eminent faculty & your support.

We are in the process of planning a 2 day International Tax conference in Mumbai in July this year and will look forward to active support from each one of you.

As we endeavor to keep pace with & meet your expectations & aspirations, I look forward to receiving your feedback, inputs & suggestions to make IFA an even more vibrant organization and ensure its activities remain relevant & timely in the current dynamic environment.

Inside this Issue

Courts Speak

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I. Indian Rulings

1. Vodafone International Holdings BV vs. UOI (Supreme Court)[1]

Gains arising on transfer of shares of foreign company that indirectly held Indian assets are not taxable in India

The Taxpayer ('Dutch Company') acquired the equity share of a company incorporated in Cayman Islands ('Cayman Islands Company') from a shareholder based outside India. The Cayman Islands Company held shares in various Mauritian entities, which directly or indirectly held shares of an Indian Company ('Indian Company'). By virtue of purchase of share of the Cayman Islands Company, the Taxpayer indirectly acquired controlling interest of approximately 52% in the Indian Company. The Taxpayer also *inter alia* acquired call options which enabling the Taxpayer to acquire additional 15% stake in the Indian Company.

The Tax Authority contended that the Taxpayer was liable to withhold taxes on the gains made by the erstwhile shareholder of the Cayman Islands Company on sale of share in Cayman Islands Company.

Held, there is no contradiction in its earlier rulings[2] since tax planning within the legal framework is not required to be tainted as illegal or illegitimate. Due regard should be given to the true nature of a transaction by looking at the legal arrangement between the parties.

Held, under the deeming source rule provisions in the Indian Income Tax Act, 1961 ('Act'), the capital asset being transferred should be situated in India. The deemed source rule provisions cannot be construed as being 'look through provisions' to cover indirect transfers as well.

Held, that in the absence of any specific provisions, the Limitation of Benefits clause cannot be read into the India Mauritius tax treaty to deny tax benefits to tax residents of Mauritius.

Held, a controlling interest is an incidence of ownership of shares of the company and is not a distinct capital asset. Accordingly, acquisition of controlling interest cannot be separated from the acquisition of shares, without a specific legislative intervention.

Held, no withholding tax obligations exist in present case since the payments to non-resident are not taxable in India.

2. Delmas France vs. ADIT (Mumbai ITAT)[3]

On specific facts and under tax treaty between India and France ('DTAA'), an agent remunerated at arm's length should not constitute Dependent Agent Permanent Establishment ('DAPE') of the principal

Further, on a conceptual level, the argument of profit neutrality on account of arm's length remuneration to a DAPE may not always be justifiable since DAPE presumably carries an entrepreneurial risk for which it may not have been remunerated

The Taxpayer, French Company, was engaged in the business of operation of ships in international traffic. The Taxpayer had an agent in India, which was *inter alia* responsible for concluding contracts on behalf of the Taxpayer in the form of obtaining clearances from the

[1] 341 ITR 1
[2] Azadi Bachao Andolan (263 ITR 706) & Mc Dowell (154 ITR 148)
[3] 49 SOT 719

Government departments, collected freight on behalf of the Taxpayer and maintained a bank account for the Taxpayer.

The Tax Authority held that the Taxpayer has a fixed place PE in India since its business is carried on by its agent in India wherein the agent was to maintain the office for the principal duly equipped. Accordingly, in the absence of details to compute profits of the PE, the Tax Authority adopted total income of the Taxpayer at 10% of gross receipts. The Mumbai ITAT passed its ruling on the following aspects.

Controversy relating to PE

Despite the Mumbai High Court[4] decision, the ITAT was requested to adjudicate on the merits of the case since (i) the Tax Authorities are in appeal against the decision of the Mumbai High Court; and (ii) the Circular No 23 of 1969, which formed the basis of the Mumbai High Court ruling had been withdrawn by the Tax Authority.

Basic PE Rule

Held, in the agency business model, the subjective criterion for existence of PE, i.e. right to use the place of agent by principal cannot be satisfied. The use of physical location is, in this business model, always by the agent - though for furtherance of business interests of the principal.

DAPE

Article 5(5) of the DTAA provides situations in which business carried on through a DA creates a PE. However, under Article 5(6), even when an agent is wholly or almost wholly dependent on the foreign enterprise, it would still be treated as an independent agent, unless the transactions are not at arm's length. In cases where an agent is considered as an independent agent, the provisions of DAPE under Article 5(5) would fail.

Held, in the absence of any negative finding by the Tax Authority, on the arm's length test failing, it could not be inferred that the agent was not of an independent status. Accordingly, the Taxpayer did not have any PE in India.

Profit attribution

On a conceptual level, the ITAT observed that a DAPE inherently assumes the entrepreneurship risk which a DA does not assume. To that extent, there may be a subtle line of demarcation between the DA and the DAPE. Accordingly the tax neutral theory (which provides that no profit can be attributed in case the PE is remunerated at arm's length) which is generally applicable to a DA, may not be wholly unqualified in cases where DAPE exist.

3. Centrica India Offshore Private Limited (AAR)[5]

On specific facts, employees seconded by an overseas company to an Indian group company for providing managerial services could not be considered as employees of the Indian group company

The scope of fees for technical services under tax treaty between India and United Kingdom ('India – UK DTAA') and under tax treaty between India and Canada ('India – Canada DTAA') did not include managerial services

On specific facts, presence of employees of overseas company in India could constitute Service PE of the overseas company

The Applicant, a company incorporated in India is the wholly owned subsidiary of a company in United Kingdom ('Parent Company'). Two subsidiaries of the Parent Company, incorporated in United Kingdom and Canada (collectively known as 'Foreign Subsidiaries') entered into service agreements with the Applicant. The Applicant was agreed to be remunerated on a cost plus basis.

The Foreign Subsidiaries seconded certain personnel to the Applicant. The seconded employees would work under the control, supervision and directions of the Applicant. The Foreign Subsidiaries would not be responsible for the work of the seconded employees. The salaries of the seconded employees would be paid overseas by the Foreign Subsidiaries and reimbursed by the Applicant to the Foreign Subsidiaries.

The Applicant approached the Authority for Advance Rulings ('AAR') seeking a ruling on whether the

[4] SET Satellite (Singapore) Pte Ltd (307 ITR 205)

[5] 19 taxmann.com 214

reimbursement of salaries by the Applicant to the Foreign Subsidiaries would be taxable in India.

Identification of employer of the seconded employees

Held, the seconded employees would be employees of the Foreign Subsidiaries since *inter alia* the (i) the salaries continued to be paid by the Foreign Subsidiaries; (ii) the seconded employees would not have recourse to the Applicant in respect of their salaries; and (iii) right to terminate the employment of seconded employees vested in the Foreign Subsidiaries.

In identifying the Foreign Subsidiaries as the employer if the seconded employees, the AAR observed that mere entitlement of the Foreign Subsidiaries to recover the salary costs from the Applicant does not necessarily suggest that the liability to pay the salaries lay with the Applicant. On specific facts, the AAR's ruling was also based on the fact that work performed by the seconded employees was not unconnected with the activities of the Foreign Subsidiaries.

Held, the reimbursement to the Foreign Subsidiaries did not constitute diversion of income by overriding title since the Applicant was not obliged to pay the salaries to the seconded employees.

Characterization of reimbursements in hands of Foreign Subsidiaries

Held, the services rendered by seconded employees were in the nature of managerial services, which are not covered within the ambit of fees for technical services under the India – UK DTAA and India – Canada DTAA.

Held, that on facts, since the Foreign Subsidiaries were the employers of the seconded employees, rendering of services by the seconded employees on behalf of the Foreign Subsidiaries could create service PE of the Foreign Subsidiaries in India.

4. Shell India Markets Private Limited (AAR)[6]

On specific facts, reimbursement of costs under cost contribution arrangement for availing business support services would be taxable as fees for technical services under tax treaty between India and United Kingdom ('India – UK DTAA')

The Applicant and its overseas group companies, entered into a cost contribution arrangement ('Agreement') with a group company in United Kingdom ('UK Company'). Under the Agreement, the UK Company would provide general business support services which *inter alia* include advisory services in respect of contract and procurement, tax matters, law, technology, etc. The costs incurred by the UK Company would be reimbursed by the various group companies on actuals.

Held, the business support services provided by the UK Company were in the nature of consultancy services since (i) Services are of specialized nature involving specialized knowledge of a particular industry; (ii) Advice would be tendered for taking commercial decisions by the Applicant; and (iii) the rendering of services would entail certain human intervention by the UK Company.

Held, the consultancy services rendered by the UK Company 'make available knowledge' to the Applicant since (i) industry specific expertise would be provided to the Applicant; (ii) the employees of the Applicant would be in a position to use such expertise even post termination of the Agreement without reference to the UK Company; and (iii) under the Agreement the Applicant would be an owner of the know how developed under the Agreement. The AAR also explained that the concept of 'make available' only means that the service recipient should be capable of deriving enduring benefit from the services and utilize the knowledge on its own in the future irrespective of whether a specific right is conveyed to the service recipient to utilize the same.

Held, that even where the services did not involve any element of profit, the same would still be taxable in India.

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[6] 247 CTR 300

5. *Red Hat India Private Limited (AAR)*[7]

Application filed before the AAR would be inadmissible in cases where return of income involving amount arising out of the identical transaction has been filed prior to the date of filing of application before the AAR

The Applicant approached the AAR seeking a reconsideration of its earlier rulings rejecting applications filed by Applicants who had filed their tax return and subsequently filed an application before the AAR for identical transactions.

Held, on filing of the tax return, questions regarding chargeability of the amount paid or recovered under a particular transaction during the Assessment Year, would arise for consideration and decision before the Income Tax Authority. Accordingly, the question raised in the application before the AAR would already be pending before an Income Tax Authority.

Held, accepting the contention that a question could be considered as pending before an Income Tax Authority only from the date of notice under section 142(1) or 143(2) of the Income Tax Act, 1961 would mean that the jurisdiction of the AAR to adjudicate on an application would be dependent on the diligence or non-diligence of the Income Tax Authority. A jurisdiction cannot depend on such vagaries of the Income Tax Authority.

6. *Prudential Assurance Co Ltd vs. ADIT (Mumbai ITAT)*[8]

Business loss on sale of securities by a Foreign Institutional Investor may be set off against income from other sources by taking recourse under the Income Tax Act, 1961 ('Act') even in absence of a permanent establishment ('PE') in India

The Taxpayer had earlier approached the Authority for Advance Rulings ('AAR') regarding characterization of income from sale of securities as business profits under the applicable tax treaty and the same was accepted by the AAR. The Taxpayer incurred a loss on sale of securities which was set off against its income from other sources (e.g. dividend and interest income) as per the provisions of section 71 of the Act.

The Tax Authority, during reassessment proceedings, disallowed the set off of business losses against income from other sources since the Taxpayer did not have a PE in India.

Held, a non-resident taxpayer has the option to be governed by the provisions of the Act or the relevant tax treaty, whichever are more beneficial. The AAR had earlier ruled that income from sale of securities would constitute business income of the Taxpayer. Accordingly, such income would be taxable as business profits under the Act as well. In such a scenario, the set off of business losses against income from other sources would be allowable under the Act, irrespective of the fact that the Taxpayer did not have a PE in India in the absence of any such specific requirement under section 71 of the Act.

7. *XYZ India (AAR)*[9]

On specific facts, buyback of shares held by a Mauritian company in an Indian company is a scheme devised for avoidance of tax on distributed profits contemplated in section 115-O of the Income Tax Act, 1961

The Applicant, a company incorporated in India made an offer to its shareholders to buy back its shares. 98.24 % of its shares were held by three overseas group companies in USA, Mauritius, Singapore and only 1.76% by the general public. Amongst the group company shareholders, only the Mauritian company accepted the buy-back offer by the Applicant.

The Applicant approached the Authority for Advance Rulings ('AAR') seeking a ruling on whether the capital gains accruing to the Mauritian company pursuant to the buyback of its shares in the Applicant would be exempt from tax in Indian under Article 13 of the India – Mauritius tax treaty.

[7] 18 taxmann.com 259
[8] 19 taxmann.com 292
[9] 20 taxmann.com 89

Held, the buy back proposal is a scheme devised for avoidance of tax. Accordingly, the legal form of the transaction, i.e. buyback is to be ignored as such. The arrangement would constitute a distribution of profits by a company to its shareholders which does not attract Section115-O of the Act. Such distribution would fall within the definition of dividend under the Act and the exception provided in cases of buyback would not be applicable to such distribution. Even under the India-Mauritius tax treaty, the distributions would be governed by Article 10 (Dividends) and not Article 13 (Capital Gains). Accordingly, the Applicant would be required to withhold taxes on such payments to the Mauritian shareholder.

In passing its ruling, the AAR also interpreted various facts of the present case in an adverse manner. The AAR observed that prior to introduction of section 115-O of the Act, the Applicant was declaring dividends. However, no dividend had been paid to any of the shareholders after introduction of Section 115-O of the Act and the reasons for the same could not be properly explained by the Applicant. Furthermore, the AAR observed that the shareholders of the Applicant which were residents of USA and Singapore did not accept the buyback since it could be taxable in India as capital gains under the relevant tax treaties whereas no capital gains would be taxable in India under the India – Mauritius tax treaty.

II. Overseas Rulings

1. Commissioner for HMRC v. George Anson (UK Upper Tribunal)[10]

Section 741 refers to UK taxation and thus, anti avoidance provision of section 739 is invoked only if the purpose of the transaction was to avoid UK taxation

The Taxpayer, a UK non-domiciled individual was a participant in a Delaware LLC, USA and was subject to USA federal and state tax on the profits of the LLC as they arose (on the basis that the LLC had not elected to be treated as a corporation, and was thus treated as transparent for US tax purposes).

The Taxpayer remitted his income from the Delaware LLC to UK and the Tax Authority sought to tax him on the basis that the remitted income was a dividend. No credit was given for tax paid in the USA. The Upper Tribunal had in its earlier ruling[11] held that Delaware LLC was transparent for UK tax purposes but the tax payer merely had a contractual entitlement to receive amounts credited to his capital account. As such, those amounts when distributed to him were clearly not the same amounts which had been subject to US tax. Thus, tax payer was not entitled to double taxation relief under UK-USA Treaty. In the result, he sustained US tax at the rate of 45% on income distributions from the Delaware entity, and then further UK tax (at 40%) on the balance which was remitted to this jurisdiction.

Since the Taxpayer could not get the double taxation relief, he now seeked to invoke an anti-avoidance provision, section 739 of the Income and Corporation Taxes Act 1988 ("the Act") contending that he has entered into transactions which have sent assets out of the jurisdiction as a result of which income has become payable to a person outside the UK (the Delaware entity). The reason for such contention was that if the section 739 of the Act was invoked, the income from that Delaware entity would be deemed to be his and therefore he would be liable to tax on the gross amount. However, under section 743(2) of the Act, if section 739 of the Act is invoked, he is entitled to the same relief as he would have been entitled to had the income actually been his and that includes double taxation relief.

Held, section 741 of the Act, which provides exemption from section 739 of the Act, is with reference to UK taxation and it cannot readily be inferred that the tax payer intended to pay US tax plus UK tax on remittances. The most likely inference is that the tax payer anticipated that paying US tax at 45%, he would not pay UK tax at all. However, if he had paid UK tax he would have paid at 40%, which is less than, not more than, the US rate. Thus, in view of the Tribunal, That did not provide any material for supposing that the tax payer was particularly seeking to avoid paying UK tax. Thus, conditions of section 741 of the Act were satisfied and thus, anti-avoidance provision of section 739 of the Act could not be invoked.

2. Copthorne Holdings Ltd v. Her Majesty The Queen (Supreme Court of Canada)[12]

GAAR would apply when corporate re-organization is an avoidance transaction that is found to constitute an abuse

In a restructuring of a corporate group, inter alia, a Netherlands incorporated entity converted a wholly owned Canadian subsidiary (Cop I) and its wholly owned Canadian subsidiary (VHHC Holdings) into sister corporations that were subsequently amalgamated (Cop II). This was achieved by the sale of the shares in VHHC Holdings by Cop I to the Netherlands incorporated parent, followed by a horizontal amalgamation of the two Canadian corporations. A vertical amalgamation would have resulted, as per the sec. 87(3) of Income Tax Act, R.S.C. 1985 ("the Act), in the cancellation of the paid-up capital (PUC). Thus, the result of this restructuring was that the sizeable PUC of VHHC Holdings was preserved, u/s 87(3) of the Act, on the horizontal amalgamation. Section 84(3) of the Act provides that any payment on redemption of shares is deemed to be a dividend where the amount paid is in excess of PUC. However, the PUC of the amalgamated corporation was significantly greater than the PUC would have been on a vertical amalgamation. Thus, significant tax savings were subsequently realized on the redemption of shares due to this "doubling up" of PUC.

The Supreme Court concluded that the GAAR was applicable to the series of transactions. Relying on the

[10] Appeal No. FTC/39/2010
[11] [2011] UKUT 318

[12] Docket : 33283

principles established by the Court in ***Canada Trustco***[13], the Court addressed the following issues:

(i) Did a tax benefit result from the transaction?
(ii) If yes, was the transaction an avoidance transaction?
(iii) If yes, was the transaction an abuse or misuse of the Income Tax Act (Act)?

Tax benefit:

"Tax benefit" is broadly defined in the Act to include a reduction, avoidance or deferral of tax. The Court found that a tax benefit arose from the restructuring that increased the amount of PUC eligible for tax-free repatriation. The Court stated that the existence of a tax benefit is determined by comparing the transactions undertaken with an alternative arrangement that might reasonably have been carried out but for the existence of the tax benefit. Held, by comparing the simpler option of a vertical amalgamation with the chosen option of a horizontal amalgamation, the Court determined that a tax benefit resulted and that the taxpayer did not meet the onus of refuting this finding.

Avoidance transaction:

For GAAR purposes, a transaction is defined to be an avoidance transaction if, whether alone or as part of a series of transactions, it results in a tax benefit and is not undertaken primarily for bona fide non-tax purposes.

Held, it was only required to consider whether the series was taken into account when the decision was made to undertake the related transaction in the sense that it was done "in relation to" or "because of" the series. The redemption transaction was part of the same series as the prior sale and amalgamation, and that the series, including the redemption transaction, resulted in the tax benefit. Further, the taxpayer failed to prove a bona fide non-tax purpose for the sale of the subsidiary to the Netherlands incorporated parent. Consequently, there was a series of transactions that resulted in a tax benefit and an avoidance transaction that was a part of the series.

Abuse or misuse of the Act:

Abusive tax avoidance will be found "(1) where the transaction achieves an outcome the statutory provision was intended to prevent; (2) where the transaction defeats the underlying rationale of the provision; or (3) where the transaction circumvents the provision in a manner that frustrates or defeats its object, sprit or purpose. These considerations are not independent of one another and may overlap". The burden lies with the tax authorities to establish that an avoidance transaction is abusive.

In its purposive analysis, the Court noted that one cannot find abuse based on a broad statement of policy. It concluded that the object, spirit and purpose of subsection 87(3) of the Act is to preclude preservation of the PUC of the shares of a subsidiary corporation upon amalgamation where it would result in a return of PUC in excess of the amounts invested in the amalgamating corporations with tax-paid funds.

Held, the transactions of the present case resulted in an abuse of subsection 87(3) of the Act. The sale of the shares of VHHC Holdings to the Netherlands incorporated parent to protect the corporation's PUC was determined to have circumvented the intended outcome of subsection 87(3) of the Act in a manner that frustrated or defeated its objective.

3. *Commissioner of Taxation v Futuris Corporation Limited (Federal Court of Australia - Full Court)*[14]

Tax payer did not obtain tax benefit from the transaction relying on the opinion of an independent expert and thus, anti avoidance provisions would not apply

In 1997, Futuris Corporation Ltd, the Taxpayer, decided to dispose of its Building Products Division via the public float of its wholly owned subsidiary, Walshville holdings Pty Ltd (Walshville). Before the initial public offering (IPO) was undertaken, the Taxpayer transferred to Walshville certain parts of the Building Products Division held by Bristile Ltd (Bristile), another member of the Futuris Group which was owned 37% by the Taxpayer and 63% by Vockbay Pty Ltd (Vockbay) (a wholly owned subsidiary of the Taxpayer). The complex series of steps undertaken to achieve the transfer and sale of the Building Products Division had the effect of increasing the cost base (for capital gain purpose) of the Taxpayer's shares in Walshville, and thus reduced the assessable capital gain made by the Taxpayer on its disposal of the Walshville shares.

[13] [2005] 2 S.C.R. 601

[14] SAD 139 of 2010

The Tax Authority's case before the Federal Court was based on the "presumed counterfactual"; that is, the series of steps actually taken by the taxpayer except those identified as the primary scheme. The alleged effect was that the capital gain made by the Taxpayer on the sale of the Walshville shares would not have been reduced.

The Taxpayer led no direct evidence of what, as a matter of reasonable expectation, it would have done as an alternative to IPO but there were three counterfactuals which were considered by the Federal Court, one was the presumed counterfactual, and the other two were asserted by the Taxpayer on the basis of an expert report commissioned from a corporate finance specialist with Deloitte Touche Tohmatsu (**Mr Duivenvoorde**).

The counterfactual favoured by Mr Duivenvoorde, and accepted by the Federal Court, did not result in a tax benefit. The Federal Court agreed with Mr Duivenvoorde's opinion that the favoured counterfactual was less costly to implement, more attractive to the market, was more profitable and resulted in more beneficial contractual and taxation consequences than the Commissioner's presumed counterfactual.

For Australia's GAAR to apply, the disputed transaction must have three elements: a scheme, the obtaining of a tax benefit in connection with that scheme and a conclusion that the dominant purpose of the taxpayer or another party to the scheme was to enable the taxpayer to obtain that tax benefit.

The Federal Court held that the Taxpayer did not obtain a tax benefit in connection with a scheme to which provisions of GAAR (sections 177C(1)(a) and 177D(a) of the ITAA 1936) apply. Further Federal Court reasoned that if, contrary to its view, the Taxpayer had obtained a tax benefit, then the tax benefit was obtained in connection with a scheme entered into or carried out for the dominant purpose of enabling the Taxpayer to obtain a tax benefit within section 177D(b).

At the appeal to Full Federal Court, the Commissioner argued that Mr Duivenvoorde's opinion was mere speculation as to what the Taxpayer "might" have done and that it was unsupported by evidence which would have transformed it into a reasonable expectation.

Held, there was an element of speculation involved in Mr Duivenvoorde's analysis, but the expert report was "not mere speculation", rather it was an opinion which was relevant and persuasive. Moreover, it was a prediction based on given facts, established market values, calculations based on unchallenged financial data, a stated goal and the application of Mr Duivenvoorde's expertise in corporate finance and his experience as a chartered accountant.

The Full Court agreed with an earlier decision by the Federal Court that Futuris did not obtain a tax benefit and therefore ruled in the taxpayer's favour without needing to consider the issue of dominant purpose of tax benefit.

The case shows that the opinion of an independent expert, may be admissible as evidence of the counterfactuals of what might have been done had the scheme not been entered into, thereby demonstrating that no tax benefit was obtained.

Note: The Australian Assistant Treasurer has made the announcement[15] to amend the GAAR provisions so that argument of counterfactuals can no longer be considered valid.

4. Velcro Canada Inc. vs. Her Majesty The Queen (Tax Court of Canada)[16]

Some discretion over particular aspects of a revenue stream may be sufficient to satisfy the "beneficial ownership test"

Earlier, Velcro Canada, the Taxpayer entered into a licence agreement with a related Dutch resident Company (Velco Industries), under which the Taxpayer obtained the right to manufacture and sell Velcro-brand fastener products in Canada. Later, as part of reorganization of Velcro group, Velcro Industries became resident of Netherlands Antilles and it assigned to another Dutch related company, Velcro Holdings, its rights to under the licence agreement with the Taxpayer.

The issue in this case was whether Velcro Holding was the "beneficial owner" of royalties paid by the Taxpayer, and therefore entitled to a reduced rate of Canadian withholding tax under the Canada-Netherlands Treaty in respect of the royalties. Pursuant to the "beneficial owner test" described

[15] Media Release 1st March, 2012
[16] Docket: 2007-1806(IT)G

in *Prévost Car Inc.*[17], this required that the Tax Court consider the following issues:

(i) Did the Dutch holding company enjoy possession, use, risk and control of the amounts it received from the Canadian corporation?

(ii) Did the Dutch holding company act as a "conduit", an agent or a nominee in respect of the amounts it received from the Canadian corporation?

The Tax Authority's position was that Velcro Holdings was not the beneficial owner of the royalties generally because it was contractually required to remit a specific percentage of all amounts received from the Velcro Canada to Velcro Industries. If the Velcro Canada had paid royalties directly to the Velcro Industries, then the royalty payments would have been subject to a 25% Canadian withholding tax (since Netherlands Antilles does not have a comprehensive tax treaty with Canada). In the Tax Authority's view, Velcro Holdings was merely a collection agent for the Velcro Industries.

Held, Velcro Holdings was indeed the beneficial owner of the royalties. Even though Velcro Holdings may have been contractually required to pay money onward to the Velcro Industries, it retained *some* discretion as to the use of the royalties while in its possession. Velcro Holdings therefore possessed sufficient indication of beneficial ownership while it held the royalties and could not be considered a conduit based on the "beneficial ownership test" outlined in *Prévost Car Inc.*, which requires a lack of all discretion.

5. *Swiss Swaps I/A vs. Federal Tax Administration (FTA) (Swiss Tribunal)*[18]

Beneficial ownership of dividends is retained by the bank despite entering into swap transactions – to be interpreted from economic perspective

The Tax payer, a Danish bank, had entered into total return swaps with counterparties in the UK, Germany, France and the US on equity baskets involving Swiss equities. In order to hedge the swap positions the bank acquired the corresponding amount of the underlying Swiss equities.

A total return swap is a financial contract that transfers both the credit risk and market risk of an underlying asset. In a total return swap, the party receiving the total return will receive any income generated by the asset as well as the benefit if the price of the asset increases over the life of the swap. In return, the total return receiver must pay to the counterparty the set rate over the life of the swap. If the price of the assets falls over the swap's life, the total return receiver will be required to pay the counterparty the amount by which the asset has fallen in price.

Dividends received during the maturity of the trade were subject to 35% withholding tax, for which a full refund was claimed under the former Swiss-Danish double tax treaty (the current amended provides for a residual withholding tax of 15%).

The Tax Authority argued that because the bank entered into swap transactions, it was obliged to pass on the Swiss dividends received to the swap counterparties and thus, denied the refund due to missing beneficial ownership and due tax avoidance.

Held, the concept of beneficial ownership in a treaty environment has to be interpreted from substance over form perspective i.e. from the economic perspective. The beneficial ownership is defined as a person having the authority to decide how dividends proceeds shall be utilized. Entering into the swap transactions did not oblige the bank to acquire the underlying equities and thus, the bank retained beneficial ownership of the Swiss dividends. As such, the bank would also have had the obligation to pay the amount of the dividend to the swap counterparties in case the position was not hedged and the bank had not collected Swiss dividends. In addition, the bank could also decide to acquire the respective Swiss equities, independently from the swap contracts and collect dividends thereof.

Furthermore, lacking an explicit abuse clause in the double tax treaty between Switzerland and Denmark no treaty abuse can be assumed based on the fact that the Danish bank conducts a genuine commercial business activity and disposes over own offices, personnel and infrastructure.

17 *Prévost Car Inc. v. The Queen*, 2009 D.T.C. 5053 (F.C.A.)

18 *A-6537 of 2010*

Global Tax Updates

I. India

1. Form 49C prescribed for Liaison Office's to file annual statement

Recent amendments to the Indian Income Tax Act, 1961 mandated non-residents having Liaison Office in India to file a statement in a prescribed form, providing details of its activities in India in a tax year. Accordingly, Rule 114DA of the Indian Income Tax Rules, 1962 has been inserted prescribing the manner and information required to be furnished in this context. The said rule provides that the annual statement should be filed electronically in Form 49C duly verified by the Chartered Accountant or the person authorized on his behalf by the non-resident enterprise within 60 days from the end of the tax year. The format of the disclosure suggests that details of Indian operations to be furnished need not be restricted to transactions by the Liaison Office only.

Source: Notification N0.5/2012 [F.NO.142/25/2011-SO(TPL)], dated 6 February 2012

2. India ratifies Multilateral Convention on Mutual Administrative Assistance in Tax Matters

India signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters on 26 January 2012 and ratified it by depositing the Instrument of ratification on 21 February 2012. By this, India has become the first non-OECD, non-Council of Europe country to become a party to the Convention as amended by the 2010 Protocol. The Convention seeks to help the governments enforce their tax laws by creating an international framework for cooperation among countries and in countering international tax avoidance and evasion.

Source: PIB Press Releases, dated 27 January 2012 and 24February 2012

3. India notifies DTAA with Georgia

The Government of India had signed a Double Taxation Avoidance Agreement with the Government of Georgia on 24 August 2011, which came into force from 8 December 2011. The same has been notified on 6 January 2012 and shall come into effect from 1 April 2012.

Source: Notification No. 4/2012[F.NO.503/05/2006-FTD.I],dated 6 January 2012

4. India and Macau sign Exchange of Information Agreement

The India - Macau Exchange of Information Agreement relating to tax matters has been signed on 3 January 2012.

II. Australia

Australia's Government has released on an exposure draft of new transfer pricing legislation that will have retrospective effect from 1 July 2004. The Draft proposed to embody treaty and OECD principles, to effectively 'clarify' that tax treaties provide a separate taxing power and to give greater power with Commissioner to reconstruct actual transactions. The changes proposed to be introduced by the draft will reinvigorate Australian Tax Authority's audit activity.

III. Canada

Federal Budget 2012 was presented on March 29, 2012. A major thrust of the budget was innovation. There is more direct support provided for R&D in Canada and a scaling back of the benefits of the Scientific Research and Experimental Development (SR&ED) tax incentive program. The government has also moved to close what it considers to be tax loopholes, including important changes in the personal, corporate, charities and international tax areas.

The main proposals in International taxation include treatment of secondary adjustment of Transfer pricing as deemed dividend, extension of scope of thin capitalization, introduction of rules for foreign affiliate dumping.

IV. Italy

The Italian Government modified its rules on exit taxes. Under the new rules, for a residence transfer to a European Union or European Economic Area member state, an Italian taxpayer can opt for postponement of tax payments due to the actual realization of the unrealized capital gains.

V. Singapore

Few are the important amendments proposed by the Budget 2012 presented on February 17, 2012:

- Rate and chargeable income – No changes are proposed to the 17% corporate tax rate.
- Cash grant for SMEs
- Enhancement of Productivity and Innovation Credit (PIC) scheme
- Enhancing the liberalized WHT exemption regime for banks
- Enhancing the designated investment and specified income lists for financial sector incentive schemes
- Extending WHT exemption for OTC financial derivative payments
- Exempting charter fees for ships from WHT
- Gains on share disposals by companies – For disposals effected on or after 1 June 2012, the Minister would establish guidelines specifying when a company would not be taxed on gains from the disposal of shares; specifically, such gains would not be taxed if the divesting company holds at least 20% in the company whose shares are being disposed and maintains that shareholding for at least 24 months prior to the disposal.
- Enhancements to Mergers & Acquisitions scheme

VI. South Africa

Few are the important amendments proposed by the Budget presented on February 22, 2012:

- Tax rate for foreign companies to be reduced from 33% to 28%
- The secondary taxation on companies (STC) to be replaced by dividends tax which will be levied at 15%
- Withholding tax rates on royalty and interest income be increased to 15%
- Interest associated with the use of debt to acquire a controlling interest of at least 70% in a company to be allowed as a deduction, subject to limitations
- Increase in effective capital gains tax rates

VII. United Kingdom

Few areas around which amendments are proposed by the Budget presented on March 21, 2012:

- Main rate of corporation tax for FY 2012 reduced to 24%
- New CFC regime to target only those circumstances that result in the artificial diversion of UK profits
- Introduction of Patent Box to elect lower corporate tax rate
- Various capital allowances
- Enhanced R&D Tax credit
- Taxation of life insurance companies
- Enterprise investment scheme
- Taxation of non UK domiciled individuals and Anti avoidance measures

VIII. USA

Few areas around which amendments are proposed by the Budget 2013 released on February 13, 2012:

(i) Various incentives for expanding manufacturing and insourcing jobs in USA

(ii) Specific international tax measures include proposals from previous Administration budgets that would:

- Defer deductions of interest expenses related to deferred income of foreign subsidiaries
- Require pooling of foreign tax credits
- Tax current US tax on "excess returns" associated with transfers of intangibles to a controlled foreign corporation (CFC);
- Limit shifting of income through intangible property transfers
- Modify tax rules for dual capacity taxpayers
- Limit earning stripping by expatriated entities
- Disallow deduction for excess non-taxed reinsurance premiums paid to foreign affiliates

(iii) New revenue-raising proposals:

- Tax gain from the sale of a partnership interest on look-through basis
- Prevent use of the leverage distribution from related foreign corporations to avoid dividend treatment
- Extend section 338(h)(16) to certain asset acquisitions
- Remove foreign taxes from the section 902 corporation's foreign tax pool when earnings are eliminated
- Expand the definition of built-in loss for purposes of partnership loss transfers
- Extend partnership basis limitation rules to non-deductible expenditures
- Limit the importation of losses under section 267(d)

IX. UN Model Convention

The updated version of UN Model Double Taxation Convention was released on March 15, 2012. The 2011 update replaces the earlier version published in 2001. Some of the key changes in the 2011 UN update are:

- Article 1 – 2011 update provides more extensive and detailed commentary on improper use of tax treaties
- Article 5 –A number of changes are made in the Commentary of Article 5, such as meaning of 'place of business' at the disposal of', 'place of business', PE under short term scenarios, Construction PE being 'self-standing' provision, six-month test to fiscally transparent partnerships etc.
- Article 13(5) expands the scope to specifically include a specified shareholding held indirectly by the alienator at any time during the 12 months preceding the alienation
- Article 26 (Exchange of Information) is amended and Article 27 (Assistance in collection of taxes) is introduced for the first time and they are largely similar to that in OECD 2010 MC

In response to the 2011 update of the UN Model Convention, Government of India ('GOI') has addressed a letter dated March 12, 2012 in which it has registered its objections to the provisions in the UN Model Convention. GOI reiterated its stand on support to Inter-Governmental Commission over the existing Committee in Tax Matters. Further, GOI expressed its disagreement to the use of OECD Transfer Pricing Guidelines by the UN.

Indian Budget 2012 -
Key international tax related proposals

The Union Budget for 2012-13 presented by the Finance Minister on 16 March 2012 may appear unprecedented when one looks at the number and scope of international tax related amendments / clarifications proposed in the Indian tax laws, some of which may apply retrospectively. Some of the key international tax related proposals in the Finance Bill 2012 are in respect of the following:

1. Taxability in India of offshore asset transfers including indirect transfers

2. Introduction of General Anti Avoidance Rules

3. Transfer Pricing ('TP') related proposals
   - Introduction of Advance Pricing Agreements
   - Domestic transactions brought within ambit of TP
   - Scope of term 'international transactions' widened / clarified

4. Provisions relating to double taxation avoidance agreements entered into by India
   - Date of applicability of meanings of undefined terms
   - Mandatory furnishing of tax residency certificate
   - Time limit for seeking information under DTAA extended

5. Other miscellaneous provisions
   - Ambit of royalty definition widened
   - Concessional tax rate on dividends from specified foreign companies
   - Taxability of non-resident sportsmen and entertainers who not citizens of India Mandatory tax
   - Return filing for residents having assets located outside India
   - Time limit for issue of notice extended in specified circumstances
   - Tax and withholding tax rate on interest payments by specified infrastructure companies pegged at 5%
   - Cascading effect of dividend distribution tax rationalized

6. Scope of withholding tax provisions on payments to non-residents clarified

Experts Speak

Importance of Advance Pricing Arrangements in international tax environment

Samir Gandhi, Mehul Shah, Sanhita Guha
Senior Tax Professionals - Deloitte Haskins and Sells

With the increasing globalization wave sweeping across nations, plethora of cross-border business opportunities has opened up for multinational companies (MNC's). However with such expanding business opportunities, MNC's are plagued with growing complex transfer pricing issues and tax uncertainties, which often act as a roadblock in effective business planning. Tax authorities in India and across other jurisdictions are proactively vying for the same tax revenues and transfer pricing has been a major area of focus.

Advance Pricing Agreement (APA) or "arrangements" is a structure developed to smoothen and complement the traditional judicial mechanisms for resolving of transfer pricing issues and help in determining the arm's length pricing of controlled transactions which the taxpayer may propose to enter into in future. In this framework the tax administration and a taxpayer arrive on a settlement that, given the agreed APA conditions for the covered years, the tax administration would accept the tax outcomes as being consistent with arm's length outcomes, and thereby refrain from auditing the taxpayer's international transaction(s) covered by the APA. It creates a win-win situation for both the tax administrators and taxpayers alike.

Normally APA is prospective but many tax jurisdictions allow an APA to address issues that are under dispute in respect of periods prior to the commencement of the APA. In such cases, the outcomes discussed and agreed in the APA may be suitable to be applied (or "rolled back") to the transactions in prior periods.

Types of APA's

There are various types of APA's ranging from unilateral, bilateral and multilateral.

a) A unilateral APA is an arrangement wherein a certainty is determined regarding the arm's length price between the tax administrator in whose country the APA has been initiated and the taxpayer.
b) Bilateral/Multilateral APA's as compared to the unilateral APA's offers more tax certainty and covers full scope of transactions encompassing more than one jurisdictions, which would potentially form a part in the proposed international transaction.

One of the downside of a unilateral APA is an increased risk of double taxation as the associated enterprises of the taxpayer may be subjected to a tax liability in its jurisdiction. Hence in such cases a bilateral APA or multilateral APA would be a viable option wherein the arm's length arrangement of the proposed transactions is concurred by the competent authorities of two or more countries.

Process involved in an APA

It has been noted based on various international experiences of countries where APA schemes has been introduced that there are primarily five stages involved from the inception to the conclusion of an APA. The stages are as follows: -

a) ***Pre-lodgment/filing stage:*** In this stage the taxpayer needs to determine whether it would be expedient to obtain an APA in respect of a particular international related party transaction or group(s) of transactions and, if so, whether the relevant tax authorities would be prepared to proceed with an APA application.

b) ***Formal lodgment/filing:*** In this phase the tax payer would need to make a formal lodgment of the APA application in accordance with the directions provided by the relevant tax authority and within the agreed upon time frame as discussed with the tax administrators in the pre-lodgment/filing stage.

c) ***Review and evaluation stage:*** In this stage the activities are limited to verifying of the details in the formal application by the tax authorities subject to the extent of agreement reached between the taxpayer and the tax authorities during the pre-lodgment/filing stage. In the case of multilateral APA's the tax authorities will necessarily need to establish a dialogue with their counterparts in the relevant foreign jurisdictions.

d) ***Finalization/formal agreement:*** Post the review and evaluation of the APA , the taxpayer's APA application is finalized and a formal agreement is prepared by the tax authorities to reflect the agreed terms and conditions reached with the taxpayer. In bilateral/multilateral APA's the tax authorities may enter into a separate agreement with the relevant foreign tax authorities.

e) ***Monitoring and annual reporting:*** This would be in a nature of annual report would include the details of the actual related party international transactions undertaken during the relevant financial year covered by the APA, confirm the use and evidence of the application of the transfer pricing method agreed in the APA etc.

<u>APA in India</u>

In India, advance pricing agreements have been introduced in the Finance Bill 2012. Sections 92CC and 92CD are newly inserted in the Act with effect from 1 July 2012. The Finance Bill 2012 states that *"APA is an agreement between a taxpayer and a taxing authority on an appropriate transfer pricing methodology for a set of transactions over a fixed period of time in future"*. The salient features of the APA proposed are as follows:-

a) Central Board of Direct Taxes (Board) is empowered to enter into an APA with any person undertaking an international transaction;
b) The arm's length price may be determined under any method whether prescribed or not under the Indian regulations;
c) Validity of the APA to not exceed 5 consecutive years;
d) APA to be legally binding on the taxpayer and the tax authorities during the tenure;
e) APA to be void in case of fraud or misrepresentation;
f) The process and procedures of the APA program would be prescribed by the Board; and
g) No threshold prescribed for eligibility of taxpayers for APA.

The primary intent of introduction of APA scheme in India was to simplify the transfer pricing compliance process and provide more certainty to the taxpayer with respect to its transfer pricing issues.

<u>Advantages of APA</u>

For taxpayer:

a) Resolution of uncertainty on a prospective basis;
b) Prevention of double taxation;
c) Avoidance of protracted litigation and associated costs and penalties;
d) Addressing of real time issues as well as complex matters;
e) Potentially lower compliance costs; and
f) Development of a cooperative and a constructive relationship with the tax authorities.

For the Government:

a) Introduction of APA scheme is a step towards the right direction towards the government's aim to develop a cooperative compliance model with taxpayers;

b) Given the certainty assurance that is expected to be provided by the APA, it is anticipated that this would provide a much needed stimulus for increased foreign direct investment; and

c) Administration and enforcement costs are estimated to be considerably reduced over the tenure of the APA. .

APA Regime in other countries

Although the rules and procedure for the APA process is expected to be notified by the board, it is imperative for competent authorities in India to draw in inferences from already existing APA regime which have been in operation for many years in countries such as USA, Canada, and Australia and also from Asian countries such as China, and Japan given the economic and cultural similarity. Japan has been the pioneer in introducing the APA schemes in its tax legislation followed by US and other countries. Most of the countries, which have introduced APA's, have concluded both unilateral and bilateral APA's. Apart from US and Canada, many of the APA regime nations do not have a filing fee for APA. Further the roll back options are available in almost countries although the same is based on approval by the tax authorities.

Proposed Regulations for APA in India

Given the rules for APA framework in India are yet to be prescribed by the Board, the taxpayers would be looking for clarity on the following key aspects:

a) ***Scope for rollback of APA's:*** While an APA is prospective there may be instances where an APA may address issues that are either under audit or in dispute in respect of periods prior to the commencement of the APA. In such cases, the outcomes discussed and agreed in the APA may be suitable to be applied (or "rolled back") to the transactions in the prior periods.

b) ***Bilateral / multilateral APA's:*** Almost all the existing Double Tax Avoidance Agreements (DTAA's) entered into by India have a Mutual Agreement Procedure ("MAP") clause. Accordingly, Bilateral / Multilateral APA's would be a preferred option for MNC's since it would provide a cushioning effect against double taxation.

c) ***Confidentiality of the data*:** During the APA process the taxpayer is expected to share significant amount of confidential data such as information on intellectual property etc. and hence the taxpayers would want a comfort from the authorities regarding the protection of such confidential information.

d) ***Adjustments and variation allowed in the determination of the arm's length price to the taxpayer*:** Given the existing issues faced by the taxpayers in the audits including the application of the $\pm$5% range benefit, multiple year data etc. it will be advisable that authorities provide detailed guidelines on the adjustments & variations which may be acceptable.

e) ***Organization and Administration*:** Clarity is required on whether a separate Directorate will be responsible for the administration of the APA mechanism. Further, The Directorate needs to be strengthened with adequate resources well equipped to handle large number of cases that may come up for APA.

In order to make the APA scheme more robust, the Board can invite recommendations from various industries regarding the draft APA procedures so as to take into account the practical aspects and public perceptions while implementing the final procedural rules for APA.

Undoubtedly the introduction of APA in India is a welcome measure and has been announced at a time when MNC's are reeling under huge transfer pricing adjustments, given the complexity of transfer pricing issues involving royalty payments, intragroup services and corporate guarantees. It is expected that APA would serve as an important tool for transfer pricing controversy management and provide an effective solution to minimize tax and reporting risks. Moreover, the success of the APA scheme in India to a larger extent would depend on the co-operation and mutual trust between the taxpayer and the tax authorities.

Experts Speak

Whether ‘indirect transfer’ and ‘Section 195’ related retrospective amendments proposed by Budget 2012 are tenable in law, and are they ‘just’?

Rahul Garg
Senior Tax Professional - PWC

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.

The Apex Court in Vodafone Ruling observed that *“Certainty is integral to rule of law. Certainty and stability form the basic foundation of any fiscal system. Tax policy certainty is crucial for taxpayers (including foreign investors) to make rational economic choices in the most efficient manner.”* Interestingly, our legislature paid heed to this advice, just that they have sought to bring in certainty from the past 50 years ago. One would hardly disagree that this policy of amending law retrospectively would usher in an era where no one is certain of what is in store in the next budget. Investors would rather require crystal gazers than legal experts to be able to take business decision, lest a future retrospective amendment may make a hole in their pockets. It has also been retrospectively clarified that the obligation to deduct tax applies to all persons including non-residents. Consider difficulties for a non-resident who has no place of business, business connection or any other presence in India. If one flips the situation, one would realize how onerous the proposed amendment is, where an Indian company making payment to several foreign jurisdictions, apart from withholding tax under Indian domestic law is required to know, understand and undertake tax withholding compliance as per local laws of all those countries. The amendment expects the non-residents to withhold taxes on transactions which have already been executed in the past. This coupled with several other clarificatory amendments for taxation of software payments; connectivity payments etc. could result in several non-resident payers being treated as ‘assessee in default’.

Let’s take an example to understand complexity the proposed amendments would bring in. Where a foreign broadcasting company makes payment to a satellite company for relaying its channels in India, the proposed retrospective amendments in royalty provisions would first treat such payments as taxable in India overruling Delhi High Court Ruling in AsiaSat with retrospective effect and then enforce withholding liability on the non-resident payer for past years. This is leading to a situation where government is asking businessmen to “do the impossible” i.e. deduct tax for a transaction completed many years ago – all because of an amendment in law being made today. The amendments may have brought certainty, but non-consideration of interplay of various amendments would lead to lot of litigation.

Undoubtedly, the legislature is competent to enact laws which are retroactive in effect and taxing statutes are no exception. It could have brought in substantive amendments to tap perceived revenue leakages, but using a back-door for bringing clarificatory amendments, which are certainly not clarificatory seems be a signal of a weak tax policy. Interestingly, revenue has pleaded the intention of Section 9 being a "*look through*" in Vodafone matter. Hon'ble Apex Court after inter-alia considering the arguments on intention of law held that indirect transfer cannot be taxed in India. In the words of the Apex Court, *"We have to give effect to the* ***language of the section when it is unambiguous and admits of no doubt regarding its interpretation****, particularly when a legal fiction is embedded in that section..."* It is apparent that at the time of the proceedings before Apex Court the evidence to establish the intent since 1962 was not there. Also, the court found nothing to suggest such intent in the wording of the section enacted through the parliamentary process then. One wonders what new evidence became available now after two months to assert that the intention was always to tax such transactions.

While, amendments may be challenged for want of their constitutional validity, we need to ask ourselves a question, whether it is fair to bring in laws which operate fifty years retrospectively. The answer has to be a clear no. The country by its taxing statutes is holding out to the foreign investors the taxes it proposes to levy on their investments. How can now anyone justify that it took us fifty years to realize that our law requires clarification. A prospective amendment allows a taxpayer to consciously factor in the consequences of the amendment while making his business decisions. This however is not possible in case of a retrospective amendment.

To conclude, in the famous words of Nani Palkhivala *"Every government has a right to levy taxes. But no government has the right, in the process of extracting tax, to cause misery and harassment to the taxpayer and the gnawing feeling that he is made a victim of palpable injustice."*

IFA – Quarter Gone By

31 January 2012 – Panel Discussion on Vodafone decision

Panelists: 1. Mr. Soli Dastur, Sr. Advocate 2. Mr. Pinakin Desai, EY 3. Mr. Dinesh Kanabar, KPMG. 4. Mr. Girish Dave, Special Counsel for Revenue in Vodafone case. 5. Mr. Porus Kaka, Sr. Advocate. 6. Mr. T.P. Ostwal.

Mr Pranav Sayta, Chairman of IFA –Western Branch began the session with his introductory remarks, followed by a presentation from Mr Pinakin Desai covering an exhaustive summary of the Supreme Court decision. The Panel chaired by Mr Soli Dastur thereafter discussed various aspects emerging from the decision.

Mr Girish Dave clarified that the Revenue never propounded "Dissecting Approach" and also did not lift the corporate veil, but the parties itself had demonstrated otherwise through various agreements.

On the issue of "look at" approach of the Supreme Court, Mr. Porus Kaka stated that the Supreme Court has taken a holistic approach based on facts. Mr. Kanabar added that adopting a "look through" approach raises various issues such as upto which level the "look through" can be applied viz HEL, its subsidiaries in India, their assets or respective telecom licenses etc. He also stated that the Supreme Court's "Look At" approach has wider ramifications beyond Vodafone case. Mr. Dastur observed that the Court has followed "final outcome" of the structure & the transaction and not ruled based on the "initial options" contemplated by the Parties.

For details, please click here

5 March 2012 – Study Circle meeting

The first study circle meeting for the year 2012 was conducted on 5th March 2012 at IMC. The topic of aforesaid Study Circle Meeting was '***Taxability of Sale of Computer Software as Royalty'*** wherein the speaker was Mr. Ankit Virendra Shah and the meeting was chaired by Mr. Shabbir Motorwala.

The presentation of the speaker was exhaustive, encompassing and contained in-depth analysis of various tax rulings. Due to paucity of time, the study circle meeting could not be concluded.

The aforesaid Study Circle Meeting will be conducted on April 26, 2012 with realignment of the topic in light of Finance Bill 2012.

29 March 2012: Half day Seminar on International Tax Aspects of Budget 2012

Panelists: 1. Mr. Y. P. Trivedi, MP, 2. Mr. Pranav Sayta, EY 3. Mr. Porus Kaka, Sr. Advocate, 4. Mr. Pinakin Desai, EY, 5. Sanjay Tolia, PWC, 6. Mr. Hitesh Gajaria, KPMG

In depth analysis and insights were discussed in the seminar on the following topics:

- Royalty and Satellite / Transponders Payment by Mr. Hitesh Gajaria
- General Anti Avoidance Rules (GAAR) by Mr. Pinakin Desai
- Indirect Transfer and section 195by Mr. Porus F Kaka
- Advance Pricing Agreement and Transfer Pricing by Mr. Sanjay Tolia

IFA – In Photos

Mr. Pranav Sayta, Mr. Dinesh Kanabar, Mr. Porus Kaka, Mr. Soli Dastur, Mr. Pinakin Desai, Mr. Girish Dave, Mr. T P Ostwal, Mr. Sushil Lakhani – Panel discussion on Vodafone

Participants listening to the presentation of Mr. Pinakin Desai – Panel discussion on Vodafone

Mr. Sanjay Tolia, Mr. Hitesh Gajaria, Mr. Y P Trivedi, Mr. Pranav Sayta, Mr. Porus Kaka, Mr. Pinakin Desai – Budget Seminar

IFA – Save the Date

	Study Circle Meeting	YIN Global Webinar	IFA Annual Conference
Day & Date	Friday, 27th April, 2012	Tuesday, 19th June, 2012	Friday, 6th & Saturday, 7th July, 2012
Venue	To be announced	Nishith Desai Associates 93 B, Mittal Court, Nariman Point, Mumbai – 21	Reputed five star hotel in Mumbai
Time	To be announced	6.30 pm	To be announced
Chairman	Mr. Shabbir Motorwala	Prof. Dr. Michael Lang	Eminent Indian and International experts
Speakers	Mr. Ankit Shah	To be announced	
Topics	Taxability of sale of computer software as royalty - (Follow up meeting)	Recent developments on tax anti-avoidance rules	UN MC– 2011 update, APA, Transfer Pricing, GAAR, Recent Developments in International Taxation

Committee Members
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Bhavesh P Gandhi, *Hon. Treasurer*
Dhaval J Sanghavi, *Hon. Secretary*
Dhinal Shah
Harish N Motiwalla
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Your feedback / suggestions are welcome. Please write at **ifaindiabranch@gmail.com**

About IFA

The International Fiscal Association (IFA), established in 1938 with its headquarters in the Netherlands, is the only non-governmental and non-sectoral international organisation dealing with fiscal matters. IFA has played an essential role both in the development of certain principles of international taxation and in providing possible solutions to problems arising in their practical implementation. The membership of IFA now stands at more than 12,000 from 106 countries. In 62 countries, including India, IFA members have established IFA Branches.

For further information on IFA and its activities, please visit the website www.ifaindia.in

About YIN

The Young IFA Network ('YIN') established within IFA, continues to grow. The YIN Committee has taken new initiatives to enhance the participation of YIN members in various IFA activities and to expand the reach of YIN amongst young professionals at various branch levels. A new initiative is the organisation of international webinars. YIN in the India Branch – Western Chapter is also growing in number and planning to expand its activities.