NANUBHAI DESAI & CO.

January 2010

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Contents

INCOME TAX

DOMESTIC TAXATION

GENERAL

Date for filing ITR-V form extended to 31-03-2010

Central Board of Direct Taxes (CBDT) has extended the time limit for filing ITR-V form relating to income-tax returns filed electronically (without digital signature) on or after 1st April 2009, up to 31st March 2010 or within a period of 120 days from the date of uploading of the electronic return data, whichever is later.

	Date of filing Income Tax Return	Date of filing ITR V
1	On or after 1st April, 2009	31st March, 2010 **or** within a period of 120 days from the date of filing Income tax return, whichever is later

The ITR-V form should continue to be sent by ordinary post to Post Bag No.1, Electronic City Post Office, Bengaluru – 560100 (Karnataka). However, in cases where email acknowledgement for ITR-V form is not received by the taxpayer from the CPC Bengaluru, the taxpayer may send another duly signed ITR-V form by speed post to Centralized Processing Centre, Electronic City Post Office, Bengaluru, Karnataka – 560100.

Explanation regarding Perquisite Rules published in December 2009 month's Reckoner:

We draw your attention to the Reckoner published in December 2009 particularly dealing with over view of the Perquisite Rules announced by CBDT. At Sr. no. 17 of the same, we had provided brief position with regard to perquisite valuation for free food and non alcoholic beverages provided by the employer to the employees during working hours at office or business premises. On inquiring about the same Rule, we have been given to understand that the monitory limit of Rs. 50/- per employee shall also be applicable to this Rule.

Advance Fringe Benefits Tax paid for Assessment Year 2010-11 shall be adjusted against "Advance Tax"

As per CBDT decision, advance Fringe Benefit Tax paid during the current Financial Year 2009-10 for Assessment Year 2010-11 shall be treated as Advance Tax paid by assessee concerned for A.Y. 2010-11. The assessee can adjust such sum against its advance tax obligation in respect of income for A.Y. 2010-11 or in case of loss etc claim such payment as refund as advance tax paid in A.Y. 2010-11.

CASE LAWS

Geetanjali Trading Ltd. vs. Income Tax Officer (Mumbai Tribunal)

Right to set-off loss is a "vested right" which is available despite amendment in year of set-off.

The assessee company is mainly engaged in holding portfolios of scrips largely of group companies. It is an investment company. In the return of income filed by the Company for the assessment year 2004-05, the assessee company had declared a total loss of Rs. 3,06,780/-. The assessing officer had assessed the income, both under the regular provisions as well as computed book profits u/s 115JB. The AO had made additions / disallowance on the following counts:

- Dmate Charges of Rs 218,764/- disallowed
- Interest income of Rs 344, 038/- had been assessed as income from other sources instead of Business Income and disallowed the entire interest expenses of Rs 7,944,067/-.
- Disallowance of Rs 75,818 /- u/s 14 A
- Short Term Capital Gain of Rs 434, 330/- had been taxed instead of set-off the said Gain against the carry forward of Long Term Capital Loss incurred prior to A.Y 2003-04. As per amended Section 74 in A Y 2003 – 04, the long term capital gain could only be set off against long term and not against short term –capital gain. When the assessee claimed a set-off in AY 2004-05 the question arose whether the amended law should apply or the un-amended law. AO as well as CIT (A) confirmed that assessee can not set off long term capital loss against short term capital gain.
- AO calculated the book profit u/s 115 JB by adding the expenditure disallowance u/s 14 A Rs 9,711,658/-.

The assessee filed appeal against the above disallowances before the Tribunal.

Decision of Mumbai Tribunal

For Dmate charges, the Tribunal held that this expenditure is revenue expenditure and it has to be necessarily incurred under the SEBI Rules irrespective of assessee choose to transfer the shares or not. In Such circumstances, the argument of the assessee that this expenditure is necessarily to be incurred in connection with the transfer is not acceptable and the disallowance of Dmate Charged confirmed by the tribunal.

The quantification of disallowance of interest expenditure had been set back to the file of AO for fresh adjudication in the line with the decision of special bench of the tribunal in the case of Daga Capital Management P. Ltd. 119 TTJ 289 (Mum. SB.)

The Tribunal had dismissed the ground of disallowance u/s 14 A and confirmed the disallowance made by AO by stating that this expenditure is definitely incurred on shares and can be said that it is incurred in connection with earning of dividend income.

The Tribunal Held that with the reference of case Govinddas, it was held that unless and until the statute expressly does not mention the term retrospective while amending the Act, it ought to be considered as prospective only. Applying this principle, the amended Section 74 is applicable to computation of loss under the head "Capital Gains" for AY 2003-04 and onwards. As regards loss of earlier years, the law as it then stood gave a vested right of set off the loss against all capital gains. There is nothing in the amendment which withdraws the said vested right. Consequently, the loss can be set off against short-term capital gains despite the amendment. The Tribunal allowed the claim of set of carried forward long term capital loss against the short term capital gain.

The tribunal also dismissed the ground for computation of book profit u/s 115 JB by upholding the order of CIT(A).

Navin Jindal vs. ACIT (Supreme Court)

Right to subscribe for shares arises only when the offer is made by the Company

The assessee was a shareholder in Jindal Iron and Steel Company Limited (JISCO). The Company announced equity secured PCDs (Partly Convertible Debentures) to shareholders on Rights Basis. The assessee renounced his right to subscribe to 1875 PCDs and received a consideration of Rs. 56,250 for the renunciation. Against the said sale consideration, the assessee claimed that he had suffered a diminution in the value of the original 1500 equity shares being the difference between the cum-right price per share and the ex- rights price per share aggregating Rs.3,00,000. The difference of Rs. 2,43,750 was claimed as a short-term capital loss. The Assessing Officer accepted the computation of loss on renunciation of right to subscribe to PCDs at Rs.2,43,750 but treated the same as long-term capital loss.

Decision of Supreme Court

The Supreme Court noted that the right to subscribe for additional offer of shares / debentures on Rights basis, on the strength of existing shareholding in the Company, comes into existence when the Company decides to come out with the Rights Offer. Prior to that, such right, though embedded in the original shareholding, remains inchoate. The same crystallizes only when the Rights Offer is announced by the Company. Therefore, the Supreme Court held that in order to determine the nature of the gains/loss on renunciation of right to subscribe for additional shares/debentures, the crucial date is the date on which such right to subscribe for additional shares/debentures comes into existence and the date of transfer (renunciation) of such right. The said right to subscribe for additional shares/ debentures is a distinct, independent and separate right, capable of being transferred independently of the existing shareholding, on the strength of which such Rights are offered.

The Supreme Court held that he right to subscribe for additional offer of shares/debentures comes into existence only when the Company decides to come out with the Rights Offer and it is only when that event takes place, that diminution in the value of the original shares held by the assessee takes place. Therefore, as per Supreme Court, the computation of income under the head "Capital gains" submitted by the assessee is correct and the computation of income made by the Department is erroneous.

DLF Universal vs. DCIT (ITAT Delhi Special Bench)

Even introduction of stock-in-trade as capital contribution into firm attracts section 45(3)

The assessee company was engaged in the business of real estate development. It held certain lands as stock in trade with a book value of Rs. 4.4 crores. The assessee company introduced land at market value of Rs. 11.50 crores as capital contribution to a newly constituted partnership firm viz., M/s. DLF Commercial Developers, in which the assessee became a partner and the surplus amounting to Rs.6.01 crores was credited to the profit and loss account, but, was claimed as not eligible to tax in the return of income filed by the assessee. According to the assessee, the surplus of Rs. 6.01 crores was not its income liable to tax as there was no sale or transfer of land. It was also claimed that Section 45 (3) was applicable only to capital assets and not to stock-in-trade.

The AO while treating this amount of Rs. 6.01 crores as profit chargeable to tax and had also taken a view that the new partnership firm constituted in the name and style was a bogus partnership or a sham partnership and the transaction was not genuine. CIT(A) upheld the order of the Assessing Officer. Being aggrieved, the assessee has preferred an appeal before the Tribunal.

Decision of ITAT Delhi Special Bench

The Tribunal dismissed the appeal raised by the assessee and upheld the order of the CIT (A). It was held by the Special bench that

- Section 45 (3) was inserted to supercede Sunil Siddharthbhai. However, it applies only to a "capital asset" which is defined in Section 2 (14) to exclude 'stock-in-trade'. In the absence of any specific provision, tax cannot be imposed on the ground of morality or equity.
- The transaction is colourable because the assessee has withdrawn huge sums from the firm in subsequent years is not acceptable because withdrawal in subsequent years does not make the transaction colourable in the year of introduction. Further, it was not a case where the introducing partner had walked off with the funds but the land was developed by the firm by constructing building thereon. Therefore, neither the firm was non-genuine nor the transaction of contributing to the capital of the firm was non-genuine.
- The stock-in-trade was converted into a capital asset on introduction and attracted Section 45 (3) is not acceptable because the question whether a capital asset or stock-in-trade was transferred was never the subject matter of dispute before the lower authorities. On the contrary, the finding by the AO & CIT (A) is that stock-in-trade was introduced and it was chargeable as profits and gains of business. Given the scope of its powers u/s 254 (2) and the fact that the AO was not in appeal, the Tribunal could not go into the question whether the asset introduced in the firm was a capital asset or not.
- Further the finding that the stock-in-trade was converted into a capital asset on introduction is not acceptable because the stock-in-trade could also be dealt with by the assessee in partnership given that partnership is not a distinct legal entity. The introduced asset continues to be stock-in-trade and its character does not change as a result of introduction into partnership.

- The surplus is a capital gain and in the alternative a business profit is against the basic law giving power to the Tribunal to decide as final fact finding authority. The Tribunal cannot give alternative findings.
- Consequently, in accordance with Hind Construction and Sunil Siddharthbhai, the transaction was not chargeable to tax under the head 'Profits and Gains from Business".

Swati Synthetics vs. ITO (Mumbai Tribunal)

Under "Block of Assets" even a closed unit is eligible for Depreciation

The assessee was carrying on two businesses having one division at Dombivili and the other at Surat. Division at Surat was meant for yarn texturising in the name and style of M/s Swati Polyester and division at Dombivilli carried on the business of dyeing by the name of Swati Dyeing. The division of Surat had been closed since two/three years. The AO noticed that the assessee had claimed depreciation on the assets of Surat Division, which was closed. Hence he disallowed the claim of the assessee for depreciation on the assets on account of close of one unit at Surat and the same has been confirmed by the CIT(A) observing that the assets were not used during the relevant accounting year as the Division at Surat was closed.

The sole ground raised in the appeal is in respect of disallowance of proportionate depreciation of Rs. 7, 27,249/- on account of close of one unit out of two units of the assessee.

Decision of Mumbai Tribunal

The concept of allowing depreciation on block of assets was introduced w.e.f. 01.04.1988 with the object of avoiding separate book keeping. A harmonious reading of the expression 'used for the purposes of the business', would show that it only means that the assessee has used the machinery for the purposes of the business in earlier years. The doubt as to how deprecation can be allowed on assets which are not used for the purpose of business is answered by the legislative scheme that though the profit of that year is reduced, the WDV is reduced and the gain is taxed u/s 50 when the asset is sold and block ceases to exist. The "use" of an individual asset can be examined only in the first year when the asset is purchased. The existence of an individual asset in block of asset itself amounts to use for the purpose of business. This is supported by the proviso to section 32 which provides half depreciation for assets acquired in the year and held for less than 180 days. Once an asset is included in the block of assets it remains there and can only be removed when it is sold, discarded etc or used for non-business purposes or where the entire block ceases to exist. On facts, though the entire division was closed, the assets were a part of the block of assets and depreciation was allowable thereon.

In the case under consideration the admitted facts are that the division of Surat had been closed but the block of assets of the closed unit, (the division of Surat) along with other assets of the block were used for the purpose of business in earlier years. The year under consideration is not the first year of the assets acquired. The assets of closed unit still remained exist/part of the block of assets. The said block of assets was used for the purpose of business during the year. Under the circumstances the assets of the said closed unit amounts to use for the purpose of business in the year under consideration, the Tribunal, therefore, of the considered view that the assessee is entitled for deprecation. Accordingly the Tribunal allowed the claim of the assessee.

CIT vs. Gopal Purohit (Bombay High Court)

Shares activity treated as investment in earlier years cannot be treated as business in subsequent years if facts are the same

The assessee was engaged in two different activities of sale and purchase of shares. The first set of transactions involved investment in shares in which the assessee took delivery of the shares. The second set of transactions involved dealing in shares for business purposes. The assessee was accordingly an investor as well as a dealer. The income from investment activity was offered as capital gains while the income from dealing activity was offered as business income. This position was accepted by the AO in the earlier years. In Assessment Year 2005-06, the AO took a different view and held that even the shares held on investment account had to be assessed as business income. The revenue submitted that a different view should be taken for the year under consideration, since the principle of res judicata is not applicable to assessment proceedings. On this basis, the AO took a different view and held that even the shares held on investment account had to be assessed as business income.

Decision by the Tribunal

The Tribunal noted that the assessee has followed a consistent practice in regard to the nature of the activities, the manner of keeping records and the presentation of shares as investment at the end of the year, in all the years.

The Tribunal held that the delivery based transactions in the present case, should be treated as those in the nature of investment transactions and the profit received there-from should be treated either as short term or, as the case may be, long term capital gain, depending upon the period of the holding.

The Tribunal correctly accepted the position, that the principle of res judicata is not attracted since each assessment year is separate in itself. The Tribunal held that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical, particularly in the case of the assessee.

Decision of Bombay High Court

The Bombay High Court held that the approach of the Tribunal cannot be faulted. The revenue did not furnish any justification for adopting a divergent approach for the relevant assessment year. Thus, the Tribunal has applied the correct principle in arriving at the decision in the facts of the present case. The Bombay High Court held that since no substantial question of law has been raised, the appeal of the department has been accordingly dismissed.

INTERNATIONAL TAXATION

International Circulars

Treaty between Finland and India signed

Finland and India signed an income tax treaty and protocol on 15 January 2010. Once in force, the new treaty will replace the Finland-India income and capital tax treaty of 10 June 1983 as amended by the 1997 protocol.

The Government of India and the Government of Finland had revised the tax treaty to help better exchange of information on tax evaders. Both countries agreed to bring down the withholding tax rates on dividends from the existing 15 per cent to 10 per cent. As per the revised agreement, the contracting parties "shall not deny furnishing of the requested information solely on the ground that it does not have any domestic interest in that information or such information is held back by a bank".

A clause has been added to the revised agreement which restricts the powers of a resident to prevent misuse of the Double Taxation Avoidance Agreement (DTAA). A new article had been added concerning assistance in tax collection under domestic laws and regulation. The Independent Personal Service time test was changed from 90 days or more to 183 days or more during the 12 months at the beginning or ending of a fiscal year.

The Central Board of Direct Tax panel to formulate safe harbour provisions for Transfer Pricing returns

The Central Board of Direct Taxes (CBDT) has set up a committee to formulate rules for the safe harbour provisions—a set of rules that would enable the income tax (I-T) authorities to accept the transfer pricing returns without scrutiny.

Transfer pricing refers to the price at which one arm of a company, usually a multinational corporation, transfer goods or services to another division of the same organization in order to calculate each arm's profit and loss separately.

Chaired by director-general of international taxation, the committee comprises of senior tax officials and representatives of trade and industry as well as Institute of Chartered Accountants of India (ICAI). The objective of the committee is to set conditions under the safe harbour rules to facilitate acceptance of a transfer pricing return without scrutiny. Foremost among the committee's task is to set an acceptable margin which would act as a benchmark for the industry.

For example, if the safe harbour rules stipulate that the margin in a particular industry is 20%, and if the transfer price declared by a company, engaged in that industry, is not less than the margin, the I-T authorities would accept the return without questions.

Tax regimes of many developed nations such as Australia, New Zealand and Canada have incorporated safe harbour rules in their tax laws to provide clarity on the tax liability of multi-national companies operating in their countries.

CASE LAWS

DDIT, International Taxation v. M/s Star Cruises (INDIA) Travel Services Pvt Ltd (Mumbai Tribunal)

Indian Court decision on payment to non-resident cruise tour company

The assessee is an Indian company, engaged in the business of providing travel and tour packages. The assessee had entered into an agreement with M/s Star Cruises Management Ltd(SCML), a company registered in the Isle of Man which has no tax treaty with India. As per the terms of the agreement, the assessee sells cruise tickets to Indian customers, collects sale proceeds, deducts its own commission and remits the money to SCML after obtaining approval from the Reserve Bank of India. The contracts for sale of tickets, i.e. booking confirmations and printing, etc. are signed in Malaysia. Before remitting the sale proceeds of tickets, the assessee sought a no objection certificate from the Income Tax Authorities. The Income Tax Authorities contended that the sale proceeds of tickets in India received by SCML is chargeable to tax in India. The Income Tax Authority had directed the assessee to deduct tax at source at 7.5% by treating it as deemed profit. The assessee argued that since the cruise company is outside India, no profit or income can be said to be arising in India merely from sale of tickets.

The assessee approached the CIT (A). CIT (A) upheld the arguments of the assessee. Aggrieved by the order of CIT(A), the Department approached the Tribunal

The issue before the Tribunal was whether the income received by SCML could be treated as deemed profit under Section 44B of the Income Tax Act.

Decision of Tribunal

The Tribunal held that merely because the assessee is doing booking of different cruise tour packages for a foreign company, that cannot per se be decisive for holding that said foreign company is having "business connection" in India within the meaning of section9(1)(i) and the services rendered by the assessee are general in nature as it is routine business activities. As per Section 44B, the non-resident should be in India and the amount should be paid or payable, whether in or out of India to the said non-resident or any person on behalf, on account of carriage by ship of passengers or goods at any port in India and the amount received or deemed to be received in India should be on account of carriage of the passengers, live stock, goods. Income of the non-resident shipping company cannot be charged to tax in India, unless the passengers, who have booked the cruise package, are traveling from or to any port in India. Therefore, the Tribunal upheld the contentions of the assessee and held the payment to SCML, a company of the Isle of Man, is not taxable in India.

Star India Pvt. Ltd Vs Tax Authority (AAR)

Whether allotment of shares in an amalgamated Indian company is exempt from capital gains tax in India?

Star Television Entertainment Ltd. (STEL) and Star Asian Movies Ltd. (SAML), companies incorporated in British Virgin Islands, broadcast the entertainment channels Star Plus and Star Gold, respectively, while Star Asian Region FZ LLC (SAR), incorporated in UAE, broadcasts Star One and Star

Utsav. There were 6 Applicants, from which 3 Applicants i.e. STEL, SAML and SAR were the amalgamating companies (Amal Cos) and were wholly owned by the other 3 Applicants (Shareholders). STEL and SAML are companies incorporated under the laws of British Virgin Islands (BVI) whereas SAR is incorporated under the laws of the United Arab Emirates. The Amal Cos, a part of the same group, owned certain Indian as well as non-Indian language entertainment channels. For commercial reasons, it was decided to consolidate Indian language channels and, therefore, the Amal Cos proposed to amalgamate with SIPL.

For commercial reasons, the three abovementioned Indian language channels were to be consolidated into the Indian group company, Star India Pvt. Ltd., which is engaged inter alia in the business of marketing of the channels. Accordingly, an amalgamation of STEL, SAML and SAR (Amal Cos) into SIPL was proposed, pursuant to which all assets and liabilities of the Amal Cos shall stand transferred to SIPL. In turn, SIPL would issue shares to the shareholders of the Amalgamating Companies as per a share exchange swap ratio. The scheme of amalgamation had been filed with the Bombay High Court for approval, as required by the provisions of Indian company law. Once approved, SIPL would issue shares to the Shareholders, in accordance with the share-exchange ratio arrived at by a professional valuation report.

Contention of the Applicants

Under the provisions of the Indian Tax Law (ITL), transfer of assets by an amalgamating company to an amalgamated Indian company and, also, the transfer of shares held by the shareholders of an amalgamating company in consideration of allotment of shares in an amalgamated Indian company are exempt from capital gains tax in India, if certain conditions are satisfied. Since, in the present case, these conditions were satisfied, it was argued that there should be no capital gains tax liability in the hands of the Amal Cos or the Shareholders.

Contentions of the Tax Authority

However, the Tax Authority sought to contest the exemption under the ITL on the ground that the amalgamation was a colorable device/scheme, the whole objective of which was to avoid capital gains tax.

Ruling of the AAR

The capital gains arising due to such an amalgamation would be exempt from tax in the hands of the Amal Cos, as well as the Shareholders, as the conditions prescribed under the ITL have been satisfied.

An objective for filing an application before the AAR is to have a firm idea of the tax implications in India and such an application can also be filed in respect of a proposed transaction.

The AAR clarified that the ruling is on an assumption that the scheme of amalgamation would be approved by the HC in due course, as required by the provisions of Indian company law. In case the scheme was not approved by the HC, the ruling of the AAR would be inoperative.

The AAR rejected the contention that the amalgamation scheme would lead to avoidance of taxes due from the Amal Cos or the prospects of recovery would be in jeopardy, since such a scheme provides for takeover of liabilities which also includes tax dues.

The Tax Authority's contention that profits were inflated and liabilities were reduced and, further, that the Amal Cos were stripped of the income-earning assets, prior to the proposed amalgamation, appears to be contradictory. This is because, if the Amal Cos have been stripped of such assets, then it is not possible to artificially inflate the profits prior to the scheme of amalgamation.

M/s International Tire Engineering Resources LLC v. Director of Income Tax (AAR)

Treaty between India and US - Indian decision on whether consideration paid for perpetual and irrevocable right to use of know-how taxable as royalty

The applicant, M/s International Tire Engineering Resources, LLC ('ITER'), is a company based in the US and is engaged in the business of supplying advanced technology (i.e. know-how) for manufacture of radial tyres. The applicant agreed to grant to an Indian company, CEAT Limited (CEAT), a perpetual, irrevocable and non-exclusive right to use the know-how at any place in the World, including India. Further, the applicant agreed to transfer to CEAT the ownership in certain tread and sidewall designs (Designs). The agreement was effectuated outside India for a lump-sum consideration.

The issue before the AAR for consideration:
Whether the consideration receivable from CEAT could be considered as "Royalty" or "Fees for Technical Services"

Contentions of the Applicant:
The applicant contended that the consideration was for the transfer of the technical document which was in the nature of "Plant". The consideration for

the same was received outside India and the payments were ancillary and inextricably linked to the sale of know-how, as a result of which consideration received is in relation to the subject matter sold (i.e. know-how and designs).

Contentions of the Department:
The Department contended that the payments were in the nature of "Royalty" and "Fees for Included Services" and hence taxable in India irrespective of the existence of a Permanent Establishment of the applicant in India.

Ruling of AAR:
The AAR held that the consideration paid to the applicant by CEAT was for right to use the know-how. Such right to use was non-exclusive as per the terms of the agreement, and the applicant retained the right to use the same know-how for its own purpose or provide the same rights to other parties to persons other than CEAT. Therefore, it was held that the predominant nature of the transaction was that of a right to use know-how, as a result of which the consideration should be in the nature of royalty.

Since CEAT was in India, AAR presumed that the delivery of the document would have taken place in India. Thus the transaction was not an offshore supply of technical documents as claimed by the applicant. The technical assistance services should be considered as "fees for included services" for the purposes of the Tax Treaty, and that they could not be considered "ancillary" to the "sale". Even if right to use know-how was an agreement of sale, the provision of services for an extended period and as a vital component of the contract could not be considered "ancillary" to the sale arrangement.

As regards the question of taxability of consideration for transfer of tread and side-wall designs and patterns, the transfer was absolute and the consideration could be taxable only in the event that the profits were attributable to a PE of the applicant in India. It was noted that this consideration was for the manufacture of radial tyres was to be registered in the CEAT's name and would be treated as its intellectual property. Further, even if the applicant had a service PE on account of provision of consultancy and technical services, it was held that such PE would not have a connection with the transfer of Designs. Therefore, it was decided that the consideration for Designs was not taxable in India.

Accordingly it was held that withholding tax as provided under Selection 195 of the Income Tax Act at a rate of 10 per cent was to be levied on the amounts considered taxable, i.e. the amount receivable under the agreement after reducing the consideration for the transfer of ownership in Designs.

Federation Of Indian Chambers Of Commerce And Industry (FICCI), (AAR)

India US Treaty - Services of acting as a facilitator and technical consultant for the purpose of commercialization of identified technologies, preparing technical reports including market analysis, cannot be legitimately brought within the purview of para 4(b) of Article 12 of the Indo-US DTAA.

FICCI entered into an agreement with Defence Research Development Organisation (DRDO) to provide technical and business development assistance to DRDO. FICCI also entered into an agreement with University of Texas (UT) to perform certain work and services for this project and that FICCI agreed to provide the facilities and assistance during the course of the programme.

The issue before the AAR for consideration:
Whether on the facts and in the circumstances of the case, University of Texas (UT) is not liable to pay income-tax in India out of the payments received by it from FICCI in installments and whether FICCI is not required to deduct tax under the provisions of section 195 of the Income-tax Act, 1961?

Contentions of the Department:
It is the contention of the revenue that the income shall be deemed to accrue or arise in India by reason of section 9(1) (vii) (b) of the Income Tax Act, 1961 and that the services rendered by UT are covered by Article 12(4)(b) of the DTAA. The revenue contended that the UT, through its services, is clearly making available the technical expertise / knowledge and even transfers to FICCI the technical plan which it has developed. It is, therefore, contended that the services rendered by UT are covered by Article 12 (4) (b) of the DTAA.

Decision of AAR:
In the Explanation 2 to section 9(1)(vii), the expression “fees for technical services” has been defined to mean any consideration for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel). According to this definition, the services rendered by UT might fall within the scope of the definition in Explanation 2. However, if the non-resident is entitled to the benefit under a DTAA by reason of specific provisions contained therein, then the provisions of DTAA will prevail over the provisions of domestic law.

As pointed out by the Authority in Anapharm Inc. 2008] 305 ITR 394 (AAR), “mere provision of technical and other services is not enough to attract Article 12(4) (b). On a consideration and analysis of the various services and assistance rendered by UT, the conclusion that the payment received by UT under the agreement would amount to 'fee for included services' within the meaning of para 4(b) of Article 12 cannot be derived.

Expression of opinion, formulation of recommendation, and rendering assistance to DRDO in connection with the agreed programme do not really make available the technical knowledge or know how to DRDO, except perhaps in an incidental or indirect manner.

Therefore, the services / activities provided by UT to DRDO pursuant to the agreement entered into between FICCI and UT do not fall within the purview of Article 12(4)(b) of the DTAA and the payments received under the agreement are not liable to be taxed as fees for technical services under the domestic law.

They cannot be subjected to tax as business profits in view of the undisputed and undeniable fact that UT has no permanent establishment in India and the services were not carried out through a PE in India.

ACCOUNTS & AUDIT

The core group on IFRS implementation recommends IFRS to be mandatory for big corporates in the first phase

The much-anticipated International Financial Reporting Standards (IFRS) is likely to be rolled out only partially in India from April 1, 2011.

That's because a core group on IFRS implementation, set up by the ministry of company affairs is set to recommend that it be made mandatory only for big corporates in the first phase. Corporate India may soon breathe a sigh of relief.

The panel has prepared a report recommending IFRS-based reporting only for Nifty 50, Sensex 30 and companies with a net worth of over Rs 1,000 crore. These companies may have to prepare their financial statements under IFRS for financial year 2011-2012.

In the second phase starting 2013-14, all listed companies and companies with net worth greater than Rs 500 crore will be covered.

As per the IFRS convergence road map prepared by the Institute of Chartered Accountants of India (ICAI), all listed companies were to file IFRS accounts for 2011-12.

The group is keen to avoid the chaos that IFRS implementation created in Europe a few years ago.

The government to make changes in Companies Act to converge with IFRS

The government will make necessary changes in the new Companies Bill to facilitate convergence of the Indian accounting norms with the international financial reporting standards (IFRS) by 2011.

The Ministry will carry out the exercise for necessary amendments in the Companies Act in the forthcoming Budget Session of Parliament. The required amendments to the Schedule-VI & XIV, which prescribes minimum rates of depreciation, as well as Accounting Standard Rules would also be carried out simultaneously.

In view of the regulatory and policy changes required for Indian accounting norms to merge with IFRS, a Core Group was formed by the government to facilitate convergence. This Group comprises two sub-committees working on various aspects of the policy and regulatory changes.

The Core Group, comprising the Ministry of Finance, SEBI, RBI, IRDA, CAG, PFRDA, ICAI, industry representatives and other experts, accepted the report by sub group 1 on the roadmap for convergence with IFRS.

The government also reiterated its commitment to converge with the IFRS by April 2011.

Standard on Internal Audit (SIA) 17 "Consideration of laws and regulations in an internal audit"

Recently the Institute of Chartered Accountants of India (ICAI) has come out with a Standard on Internal Audit (SIA) 17 "Consideration of laws and regulations in an internal audit".

Scope of this SIA

This Standard on Internal Audit (SIA) deals with the internal auditor's responsibility to consider laws and regulations when performing an internal audit. This SIA also applies to other engagements in which the internal auditor is specifically engaged to test and report separately on compliance with specific laws or regulations.

Objective

The objectives of the internal auditor are:

(a) To obtain sufficient appropriate audit evidence regarding compliance with the provisions of those laws and regulations generally recognised to have a direct effect on the determination of material amounts and disclosures in the financial statements;
(b) To perform specified audit procedures to help identify instances of noncompliance with other laws and regulations that may have a significant impact on the functioning of the entity; and
(c) To respond appropriately to non-compliance or suspected non-compliance with laws and regulations identified during the internal audit.

DISCLAIMER AND STATUTORY NOTICE