

Corporate Update – March 2010*

Content

TAX		Page No.
Income-Tax	Contribution under 'Cost Contribution Agreement' (CCA) for basic R&D activities held to be not liable to tax in the absence of P.E	2
	Execution of a contract by Consortium with a lead manager does not constitute an Association of Persons (AOP)	2
	Activities for supervision of erection and commissioning carried out for less than six months held not to be liable to tax in India under the DTA with Germany	3
Service Tax	Electronic filing of Central Excise and Service Tax Returns and Electronic payment of Central Excise Duty and Service Tax	3
FDI	Consolidated Foreign Direct Investment (FDI) Policy	4-5
IMPORTANT REMEMBER	DATES TO	6

India**March 2010****TAX**

Contribution under 'Cost Contribution Agreement' (CCA) for basic R&D activities held to be not liable to tax in the absence of P.E

Recently, the Authority for Advance Ruling (AAR) has held in the case of ABB Limited, Bangalore that contribution to be made by it to its parent company namely ABB Zurich, towards basic R&D activities under CCA do not constitute 'Royalties' or 'Fees for Technical Services' and as such are not liable to tax in India, in the absence of P.E. of the Swiss enterprise in India.

The AAR analyzed the terms of the CCA, as per which the beneficial ownership of the products of the research, belong to all those group companies which have signed CCA. AAR held that under the CCA, the group companies contribute to the research establishment set up for benefit of all of them. The manner in which the corporate funding is arranged based on budgeted cost and revised cost indicates that the parties to CCA have devised a methodology to reimburse the actual cost only.

Such contribution, AAR held that cannot be considered in the nature of 'Royalty' or as 'Fees for Technical Services'.

Under the agreement ABB Zurich as a coordinating agency is entitled to coordination fee as well, taxability of which was however not disputed by the taxpayer.

Execution of a contract by Consortium with a lead manager does not constitute an Association of Persons (AOP)

The Authority for Advance Ruling Authority (AAR) has recently reiterated the principle regarding taxability of a consortium. In the case of Hyundai Rotem Co, Korea, the AAR relying on its earlier decision in the case of Van Oord, held that merely coming together and acting in cooperation with each other for the purpose of executing the work, while each member carries on its own scope of work independently, does not lead to the conclusion that an AOP has been formed.

The AAR noted that under the contract, the scope of work of each member of MRMB consortium is specifically defined and it is mutually exclusive to each other. There can be no interchangeability or overlapping of the work to any substantial extent. The nature of work performed by each member is qualitatively different and each member has distinct skills. The access to the work carried on by others or providing assistance to another does not arise here. The question of substitution of the other JV member in place of an insolvent member does not also arise in the present case. One more distinction is that joint and several responsibility inter se among the JV partners was contemplated therein.

Taking into account the above facts, AAR held that each member of the consortium was liable to tax separately and the consortium cannot be treated as an AOP.

Activities for supervision of erection and commissioning carried out for less than six months held not to be liable to tax in India under the DTA with Germany

The Income-tax Appellate Tribunal, Mumbai Bench, in the case of Krupp Uhde GmbH has recently passed an order holding that where under a contract, the activities of supervision of erection and start up commissioning, were carried out for less than six months, thus not constituting P.E., the same were not liable to tax in India. The Assessing Officer had, however, held that even if there was no P.E. payment for such services was taxable under Article 12 as "Fees for Technical Services" at the rate of 10% of gross amount.

Electronic filing of Central Excise and Service Tax Returns and Electronic payment of Central Excise Duty and Service Tax

The mandatory requirement of e-filing of returns and e-payment of excise duty and service tax has been published in the "Corporate Up-date – January, 2010"

Central Board of Excise and Customs has now announced a detailed procedure for e-filing and e-payment. A copy of the procedure is attached.



Circular No. 919 09
2010 - CX.doc

FDI**Consolidated Foreign Direct Investment (FDI) Policy**

Hitherto the Government Policy pronouncements on foreign Direct Investment (FDI) were embodied in various Press Notes/Press Releases, issued from time to time. Such policy pronouncements have been incorporated in the regulations issued by the Reserve Bank of India (RBI) under the Foreign Management Act, 1999.

With the intent and objective to promote FDI “through a policy framework which is transparent, predictable, simple, clear and reduces regulatory burden”, the government has come out with a consolidated Circular on FDI Policy, comprising the existing policy covered under various Press Notes/Press Releases etc.

Effective April 01, 2010, the Government has accordingly announced a Consolidated FDI Policy in its Circular 1 of 2010.

This Consolidated circular is effective for a period of six months and would be superseded by a new Circular to be issued on September 30, 2010 to be valid for another six months.

As mentioned above, the present Circular mainly highlights the existing policy on FDI. However, there are a few changes in the policy some of which are highlighted as under:

Types of Instruments

Earlier, the FIPB was granting approvals on case-by-case basis regarding issuance of warrants and partly paid up shares to persons resident outside India.

The definition of the term “Capital” has now been amended to prohibit the issue of instruments like warrants, partly paid shares etc. to foreign investors.

Cash and Carry Wholesale Trading

The Circular provides elaborate guidelines in respect of Cash & Carry Wholesale Trading.

Cash and Carry Wholesale Trading/ Wholesale Trading (‘WT’) has been defined as sale of goods/merchandise to retailers, industrial, commercial, institutional or other professional business users or to other wholesalers and related subordinated service providers.

Further, the criterion to determine whether sale is a wholesale trading or not, shall be the type of customers to whom the sale is made rather than the size or volume of sale. Accordingly, sale for the purpose of trade, business and profession, as opposed to personal consumption, would be regarded as wholesale trading.

In order to qualify as wholesale trade, the sale by wholesale trading companies can only be made to entities (other than governmental entities), which:

- (a) hold sales tax/VAT/excise/service tax registration; or
- (b) hold trade licenses/registrations/certificates from governmental authorities (including local self-government) reflecting that such entity is engaged in the business involving commercial activity; or

India

March 2010

- (c) hold permits from governmental authorities for undertaking retail trade; or
- (d) are institutions having certificate of incorporation or registration as society or a trust.

Further, the WT entities would be required to maintain full records of the sales on a daily basis, as prescribed. They can extend normal credit facilities to group companies.

The Circular specifically lays down that wholesale trade of goods to “Companies of the same group” would be permitted subject to the following conditions:

- (a) Wholesale trade to all the group companies taken together should NOT exceed 25% of the total turnover of the wholesale company; and
- (b) the wholesale made to group companies should be for their internal use only.

In terms of the above, group companies, cannot further sell or deal in goods.

A copy of the FDI Consolidated Circular is attached below.



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pdf

In the event any clarification is required, you may contact us.

India**March 2010**

Important Dates To Remember

	Due Date
Filing of Service Tax half yearly return	25 th April, 2010
Service Tax Payment for the month of April 2010 for assesses other than individual, proprietorship firm or partnership firm	5th May, 2010
(in case of payment through electronic mode)	6th May, 2010
TDS/TCS payment for tax deducted/deductible in April, 2010	7th May, 2010

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