

India Corporate Update - December, 2011

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DIRECT TAX

I. Advance Ruling: Capital Gains in case of selling of Indian Shares by a Mauritius Company

The Authority for Advance Rulings (“AAR”) has recently held that gains arising from the transfer of shares of an Indian company by a Mauritian resident should not be taxable in India under the India-Mauritius tax treaty (“Treaty”).

The taxpayer, Ardex Investments Mauritius Limited (“AIML”) was incorporated in Mauritius in 1998 and is held by Ardex Holdings U.K. Ltd (“Ardex Holdings”), a UK based company engaged in the business of manufacturing construction material. AIML is a resident of Mauritius and possesses a tax residency certificate issued by the Mauritian tax authorities. It currently holds 50% of the shareholding in Ardex Endura (India) Pvt. Ltd (“AEIPL”), an Indian company engaged in the business of manufacturing flooring adhesives. AIML proposes to sell its entire stake in the Indian company to Ardex Beteiligungs GmbH (“ABG”), a German group company, at fair market value. It sought an advance ruling on whether capital gains on the proposed sale would be chargeable to tax in India having regard to the provisions of the Treaty.

The Revenue argued that AIML was brought into existence as a façade to make investments in India on behalf of Ardex Holdings UK, just to take advantage of the India-Mauritius Tax Treaty and thereby avoid being taxed under the India-UK tax treaty. It was argued that the assets of AIML comprised only the investment in AEIPL and that AIML did not earn any income in the year prior to the proposed transfer. The Revenue also proposed that the beneficial ownership of the shares of the Indian company vested with Ardex Holdings since the funds for purchase of such shares were sourced from the parent company. It was also alleged that the decision to sell the shares in AEIPL was taken by Ardex Holdings, which AIML followed, being its subsidiary. On this basis, the Revenue sought to disregard the corporate veil of the Mauritian entity and bring the transaction to tax under the India – UK tax treaty.

The AAR did not agree with the Revenue’s submissions. It noted that the shareholding in AEIPL was acquired over a period a period of 10 years and did not come to existence all of a sudden. It also noted that although the formation of AIML was with an eye on the Mauritius Treaty, it cannot be viewed as objectionable treaty-shopping. Relying on the landmark Mauritius case of Azadi Bachao Andolan, 263 ITR 706 (SC), the AAR held that the proposed sale was covered by the India Mauritius treaty and not under the India UK Treaty. Accordingly, the AAR ruled that the sale would not attract capital gains tax.

[Source: A.A.R. No.866 of 2010 dated November 14, 2011 (Applicant: Ardex Investments Mauritius Ltd.)]

Copy of ruling is attached for ready reference. Please refer Attachment 1.

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INDIRECT TAX

I Amendment in Delhi VAT: e payment of taxes

All the dealers/ contractees are now compulsorily required to make payment of any amount due under Delhi Value Added Tax Act, 2004 and / or Central Sales Tax Act, 1956 through electronic mode of payment from the e-payment portals of banks specified in the notification, with effect from 31.01.2012.

[Source: Notification No. F.7(400)/Policy/VAT/2011/1006-1018 dated December 28, 2011 issued under Delhi Value Added Tax Act, 2004, effective from January 31, 2012]

Copy of notification is attached below for ready reference. Please refer Attachment 2.

II Extension in due Date of filing Service Tax Return

The due date for submission of half yearly service tax return for the period April 11 to September 11 was first extended upto 6 Jan 2012 and has now been further extended upto January 20, 2012 vide the attached notification dated January 9, 2012

[Source: F.No. 137/ 99/ 2011 – Service Tax dated January 9, 2012]

Copy of notification is attached below for ready reference. Please refer Attachment 3.

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I Liberalization in Foreign Direct Investment in Single Brand Retail Trading

The Government of India, Ministry of Commerce & Industry, Department of Industrial Policy & Promotion has reviewed and liberalized the Foreign Direct Investment ('FDI') Policy in Single Brand Retail Trade vide Press Note 1 (2012 Series) dated January 10, 2012. Accordingly, FDI in Single Brand Retail Trade has been increased to 100% under Government (FIPB) Approval route from the earlier limit of 51%.

The Press Note specifies that the rationale for liberalization of FDI in Single Brand product retail trading is to attract investments in production and marketing, improving the availability of such goods for the consumer, to encourage increased sourcing of goods from India, and to enhance competitiveness of Indian enterprises through access to global designs, technologies and management practices.

The position of FDI Policy with respect to Single Brand Retail Trade before and after introduction of the above-mentioned Press Note is given below:

Present Position	Revised Position
<p>Prior to issuance of Press Note 1 (2012 Series),</p> <p>FDI in Single Brand Retail Trade upto 51% permitted with Government approval subject to following conditions:</p> <ul style="list-style-type: none"> • Products to be sold should be of a 'Single Brand' only. • Products should be sold under the same brand internationally i.e. products should be sold under the same brand in one or more countries other than India. • 'Single Brand' product-retail trading would cover only products which are branded during manufacturing. • The foreign investor should be the owner of the brand. 	<p>Pursuant to issuance of Press Note 1 (2012 Series),</p> <p>FDI in Single Brand Retail Trade upto 51% permitted with Government approval subject to following conditions:</p> <ul style="list-style-type: none"> • Products to be sold should be of a 'Single Brand' only. • Products should be sold under the same brand internationally i.e. products should be sold under the same brand in one or more countries other than India. • 'Single Brand' product-retail trading would cover only products which are branded during manufacturing. • The foreign investor should be the owner of the brand. <p>FDI in Single Brand Retail Trade beyond 51% permitted with Government approval subject to the following additional condition:</p>

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	<ul style="list-style-type: none">• Mandatory sourcing of at least 30% of the value of products sold would have to be done from Indian 'small industries'¹ / village and cottage industries, artisans and craftsmen'. <i>The compliance of this condition will be ensured through self-certification by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts, which the company will be required to maintain.</i>
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[Source: Press Note 1 (2012 Series) dated January 10, 2012]

Copy of RBI Circular is attached below for ready reference. Please refer Attachment 4.

Critical Comment

The additional condition regarding mandatory sourcing of at least 30% of the value of products from Indian 'small industries/village and cottage industries, artisans and craftsmen has been prescribed for FDI in Single Brand Retail Trade beyond 51%. However, there is no clarity weather the minimum requirement of 30% in terms of value is to be determined with respect to each sale transaction or for all sale transactions on an annual basis.

¹Small industries' would be defined as industries which have a total investment in plant & machinery not exceeding US \$ 1.00 million. This valuation refers to the value at the time of installation, without providing for depreciation. Further, if at any point in time, this valuation is exceeded, the industry shall not qualify as a 'small industry' for this purpose.

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Foreign Exchange Management Act, 1999

I Compounding of Contraventions

As a measure of customer service and in order to facilitate the operational convenience, it has been decided to delegate the powers to the Regional Offices of the Reserve Bank of India to compound the contraventions of FEMA as mentioned below:

Particulars	Regional Office	Amount of Contravention
Delay in reporting of inward remittance and delay in filing of form FC-GPR after allotment of shares	Bhopal, Bhubaneshwar, Chandigarh, Guwahati, Jaipur, Jammu, Kanpur, Kochi, Patna and Panaji	Contravention amounting to less than INR 1,00,00,000/-
Delay in reporting of inward remittance, delay in filing of form FC-GPR after allotment of shares and delay in issue of shares beyond 180 days	Ahmedabad, Bangalore, Chennai, Hyderabad, Kolkata, Mumbai and New Delhi	Without any limit

The Compounding Authorities attached to these Regional Offices of the Foreign Exchange Department have been authorised to compound such cases at their level(s) within the financial powers as per the Foreign Exchange (Compounding Proceedings) Rules, 2000. Accordingly, all applications for compounding whether received on the advice of the Regional Office concerned or suo-moto, relating to the contraventions specified above and up to the amount of contravention stated above, may be submitted by the companies falling under the jurisdiction of the aforesaid Regional Offices directly to the Regional Office concerned, together with the prescribed fee and other relevant documents. All other applications may be submitted to the Compounding Authority, Cell for Effective implementation of FEMA (CEFA), Foreign Exchange Department, 5th floor, Amar Building, Sir P.M.Road, Fort, Mumbai-400001, as hitherto.

It has been observed by RBI that there is no uniformity in submitting the required details with supporting documents along with the compounding application and this has resulted in avoidable correspondence between RBI and the applicant. It has, therefore been decided by RBI that along with the application in the prescribed format, the applicant may also furnish the details as per the prescribed annexures.

[Source: A.P. (DIR Series) Circular No. 57 dated December 13, 2011]

Copy of RBI Circular and related Press Release is attached for ready reference. Please refer Attachments 5 & 6.

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II Deregulation of Interest Rates on Non-Resident (External) Rupee (NRE) Deposits and Ordinary Non-Resident (NRO) Accounts

With a view to providing greater flexibility to banks in mobilising non-resident deposits and also in view of the prevailing market conditions, it has been decided by RBI to deregulate interest rates on NRE Deposits and NRO Accounts (the interest rates on term deposits under Ordinary Non-Resident (NRO) Accounts are already deregulated). Accordingly, banks are free to determine their interest rates on both savings deposits and term deposits of maturity of one year and above under NRE Deposit accounts and savings deposits under Ordinary NRO Accounts w.e.f. December 16, 2011. However, interest rates offered by banks on NRE and NRO deposits cannot be higher than those offered by them on comparable domestic rupee deposits.

[Source: RBI/2011-12/ 303 DBOD.Dir.BC. 64 /13.03.00/2011-12 December 16, 2011]

Copy of RBI Circular is attached below for ready reference. Please refer Attachment 7.

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Corporate Law

I Significant amendments in Companies Bill, 2011

Pursuant to the Companies Bill, 2009 which was introduced on August 3, 2009 in the Lok Sabha, the said Bill was referred to the Parliamentary Standing Committee on Finance for examination and report and the Committee gave its Report on August 31, 2010. The Central Government received several suggestions for amendments in the said Bill. The Parliamentary Standing Committee on Finance also made numerous recommendations in its Report. The Central Government has accepted in general the recommendations of the Standing Committee and also considered the suggestions received by it from various stakeholders. In view of large amendments to the Companies Bill, 2009 arising out of the recommendations of the Parliamentary Standing Committee on Finance and suggestions of the stakeholders, the Central Government decided to withdraw the Companies Bill, 2009 and introduce a fresh Bill incorporating therein the recommendations of Standing Committee and suggestions of the stakeholder.

On December 14, 2011, the Companies Bill, 2011 ('the Bill') was tabled in Parliament. The Bill proposed certain significant changes both in substantive provisions as well as

Though the Bill which was presented to the Lok Sabha on December 14, it had been sent to the Standing Committee on Finance and is now expected to be taken up in the Budget session.

Some of the major changes proposed in the Bill are as follows:

1. Companies' financial year means the period ending on March 31 every year. However, where a company is incorporated on or after 1st day of January of a year, the financial year will end on 31st day of March of the following year. However, a holding company or a subsidiary of a company incorporated outside India is a different financial year may be allowed by the National Company Law Tribunal.
2. First annual general meeting of a company to be held within 9 months of the closure of its first financial year instead of 18 months from the date of incorporation as provided under Companies Act, 1956
3. Maximum number of members in a private company proposed to be increased from 50 members to 200 members
4. In case of a public company, the quorum for a general meeting would vary accordingly to the number of members personally present at the meeting. The quorum will vary from 5 members personally present to 30 members personally present. The present regulation prescribes a uniform quorum of 5 members personally present for public companies. However, there is no change in quorum for private companies which stands at 2 members personally present.

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5. Every listed company to file a return with the Registrar regarding change in shareholding position of promoters and top 10 shareholders within 15 days of such change. It may be noted that such changes are generally incorporated in the Annual Return of the Company i.e. once a year.
6. Duties and liabilities of directors have not been specifically provided in the Act so far. The Bill seeks to specify the duties and liabilities of directors
7. Prescribed class of companies to have atleast 1 woman director
8. Every company to have atleast one director who has stayed in India for 182 days or more during the previous calender year.
9. Individual auditor can be appointed for a term of 5 years and an audit firm for 2 terms of 5 years each. Further a cooling off period of 5 years before each reappointment is proposed. Mandatory rotation prescribed for auditors.
10. 'Foreign company' means a company or body corporate incorporated outside India which has a place of business of its own or through an agent, either physically or through electronic mode which conducts any business activity in India in any manner. The proposed definition of 'foreign company' is much wider than in the Companies Act, 1956.
11. Every company having a turnover of Rs. 1000 crores or more or a net worth of 500 crores or more or net profit of 5% or more during any financial year shall constitute a Corporate Social Responsibility committee. Such a company may be required to spend atleast 2% of its average net profit every year on Corporate Social Responsibility policy as formed by the Board.
12. Small company is defined for the first time as under:

“Small company” means a company, other than a public company,—
(i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or
(ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:
Provided that nothing in this clause shall apply to—
(A) a holding company or a subsidiary company;
(B) a company registered under section 8; or
(C) a company or body corporate governed by any special Act;
13. 'One Person Company' provision introduced

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14. Whether a company is a sick company is to be determined by the National Company Law Tribunal on the basis of whether the company has failed to pay its debts.

[Source: The Companies Bill, 2011]

Copy of Companies Bill, 2011 is attached below for ready reference. Please refer Attachment 8.

Important Dates To Remember

Topics	Due by
Deposit of TDS for the month of January 2011	7th February, 2012
Deposit of Service Tax for Companies for the month of January 2011	5th February, 2012
-by e-payment	6th February, 2012

World Tax Service India Private Limited

1A-1D, Vandhna
11, Tolstoy Marg
New Delhi - 110 001.
India
www.worldtaxservice.in

Contact Person

Mr. C.S. Mathur
Telephone: +91 11 47 10 22 00
Email: csm@mpco.in

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