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# THE NEWSLETTER

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## INDIA JOINS THE MULTILATERAL COMPETENT AUTHORITY AGREEMENT (MCAA) ON AUTOMATIC EXCHANGE OF INFORMATION (AEOI)1

India joined the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information on 3rd June, 2015, in Paris, France. Ninety-four countries have committed to exchange information on an automatic basis from 2017 onwards as per the new global standards on automatic exchange of information, known as Common Reporting Standards (CRS) on Automatic Exchange of Information (AEOI).

AEOI based on CRS, when fully implemented, will enable India to receive information from almost every country in the world including offshore financial centres and will be the key to prevent international tax evasion and avoidance thereby being instrumental in getting information about assets of Indians held abroad including through entities in which Indians are beneficial owners.

The step is aimed at helping the Government to curb tax evasion and deal with the problem of black money.

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## INVESTMENTS BY NRI: DOMESTIC INVESTMENTS

The Government of India has reviewed the FDI policy relating to investments by Non Resident Indians (NRIs), Persons of Indian Origin (PIOs) and Overseas Citizen of India (OCIs) and *vide* Press Note No. 7(2015 Series) dated 3rd June, 2015 has notified the amended definition of NRIs as provided in the Consolidated FDI Policy Circular of 2015 ("FDI Policy"). The definition of NRI has been amended to include PIOs and OCIs, while retaining the erstwhile definition of "NRI means an individual resident outside India who is a citizen of India."

Further, the Government through the abovementioned Press Note has also inserted in the FDI Policy that investment by NRIs under schedule 4 of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations , 2000 will be deemed to be domestic investment at par with the investment made by residents.

[1] *Press Note dated 03June2015, Press Information Bureau, Government of India, Ministry of Finance*

## DETERMINATION OF STATUS OF NON-RESIDENT INDIANS[2]


The Hon'ble Delhi High Court has in the matter of Commissioner of Income-tax –I vs. Suresh Nanda stated that an Assessee will not lose non-resident status due to forced stay in India due to invalid impounding of the passport. Whilst the Assessing Officer (AO) and CIT (Appeals) treated the assessee as a resident Indian since he was in India, during the said years for periods amounting in all to more than 182 days, the ITAT, by the impugned order, upturned the conclusion reached by the said two authorities and agreed with the assessee that his presence in India for the said period in the two AYs was under compulsion of legal process and, thus, unintentional. ITAT held that the assessee continued to enjoy the status of non-resident and, thus, not amenable to be held accountable under the Income Tax Act for income not earned here.

The Hon'ble High Court stated that the executive action resulted in the passport of the assessee being unjustifiably impounded rendering it impossible for the assessee to leave India. He virtually became an unwilling resident on Indian soil without his consent and against his will. His involuntary stay during the period that followed till the passport was restored under Court's directive, thus, must be excluded for calculating the period under Section 6(1)(a) of Income Tax Act.

## RBI ON RESTRUCTURING OF LOANS

The Reserve Bank of India ("RBI") has, *vide* Notification No. RBI/2014-15/627 dated 08.06.2015, conferred upon the banks the discretion to undertake Strategic Debt Restructuring Scheme ("Scheme") by converting loan dues to equity shares of the borrower companies which fail to achieve prescribed milestones as part of their restructuring. Keeping in mind that the general principle of restructuring should be that the shareholders bear the first loss rather than the debt holders, the RBI *vide* this Scheme has *inter alia* provided that Joint Lenders Forums ("JLF"), at the time of initial restructuring, must incorporate, in the terms and conditions attached to the restructured loans agreed with the borrower, an option to convert the entire loan (including unpaid interest), or a part thereof, into shares in the company in the event the borrower is not able to achieve the viability milestones and/or adhere to 'critical conditions' as stipulated in the restructuring package.

The Scheme further stipulates that the aforesaid should be supported by necessary approvals/authorizations (including special resolution by the shareholders) from the borrower company, as required under the applicable laws/ regulations, to enable the lenders to exercise the said option effectively, without which the restructuring of loans is not permitted. Furthermore, if the borrower is not able to achieve the viability milestones and/or adhere to the 'critical conditions', the JLF must immediately review the account and examine whether the account will be viable by effecting a change in ownership. If in the opinion of the JLF the change in ownership is a viable option under such examination, the JLF may decide on whether to invoke the SDR, i.e. convert the whole or part of the loan and interest outstanding into equity shares in the borrower company, so as to acquire majority shareholding in the company.

[2] *[2015] 57 taxmann.com 448 (Delhi)*

## LIBERALISATION OF LIBERALISED REMITTANCE SCHEME

The Reserve Bank of India *vide* A.P. (DIR Series) Circular No. 106 ("Circular") dated 1st June 2015, has authorised the AD banks to allow remittances by a resident individual up to USD 250,000, as opposed to USD 125,000which was the earlier limit, per financial year for any permitted current or capital account transaction or a combination of both. The permissible capital account transactions by an individual under Liberalised Remittance Scheme ("LRS") are:

- Opening of foreign currency account abroad with a bank;
- Purchase of property abroad;
- Making investments abroad
- Setting up wholly owned subsidiaries and joint ventures abroad ;
- Extending loans in Indian rupees to NRIs who are relatives as defined in Companies Act 2013.

The Circular mandates the AD to provide on a monthly basis information on the number of applicants and total amount remitted under LRS to the RBI.

The amended FEMA (Current Account Transaction) Rules, 2000 in Para 2 of Schedule 3 provided in Annex 1 provides that persons other than individuals can make remittances for, within the limit and conditions laid down therein: Donations for educational institutions; Commissions to agents abroad for sale of residential flats/commercial plots in India; Remittances for consultancy services and Remittances for reimbursement of pre-incorporation expenses.

## EXEMPTIONS TO PRIVATE COMPANIES

The Central Government vide Notification [F.No.2/11/2014-Cl.V] ("Notification") dated 5th June,2015, has in the interest of public notified certain exemptions in the Companies Act, 2013 ("Act") that will be applicable on private companies. Some key exemptions as provided in the Notification are:-Section 2(76) of the Act defines "related party" to inter alia include a holding, subsidiary or an associate company of such company; or a subsidiary of a holding company to which it is also a subsidiary. The Notification provides that the aforesaid part of the definition shall not apply to private companies with respect to Section 188(*Related Party Transactions*). The Notification further provides that Section 67(*Restrictions on purchase by company or giving of loans by it for purchase of its shares*) shall not apply to private companies, subject to fulfillment of certain conditions.

Furthermore, Section 184(2) (*Disclosure of interest by director*) shall apply with the exception that the interested director may participate in such meeting after disclosure of his interest. The requirement laid down in proviso to Section 188(1) that provides that no member of the company shall vote on such special resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a related party, shall not be applicable on private companies.

## TAX ON TAX: IS IT CORRECT?

***Rahul Lakhwani, Senior Associate & Aditi Tank, Associate***

When everywhere out there is talking about GST 'a tax which will abolish the cascading effect', we, with this article, are discussing an issue which is of concern and is largely observed as not being addressed even by big corporate houses. This is because that in case of 'indirect taxes' it is an advantage that the burden can be shifted to the consumers. Further no business house wishes to get entangled in the clutches of the tax authorities.

As per the '*includes'* part of Article 366(29A) of the Constitution of India, there are certain composite contracts which have been specifically bifurcated so as to enable levy of sales tax/Value Added Tax ("**VAT**") on the supply of goods pursuant to the respective part of the said contracts. In the same transaction there is a distinct provision of providing service which is chargeable to service tax. Now a question arises that at the time of charging VAT-whether the service tax will be included in the 'taxable turnover' or whether at the time of determining the value of consideration to determine service tax liability the amount charged towards VAT liability will be in included in 'value of taxable service'? For example, if you dine in in a restaurant you will be charged with service tax on the' service portion' in the activity of supplying food and for the supply of food you shall be charged with the State VAT. So one may argue that for determining value of services, the price should be inclusive of VAT and on the other side for determining the value of goods sold, the service tax paid on it shall be included.

**Service Tax**

The section governing 'Valuation of taxable services for charging service tax' is Section 67 of the Finance Act, 1994. The said section provides that the value of taxable services shall be determined as follows:

| Particulars | Value |
|---|---|
| In case where the provision of service is for a consideration in money | Gross amount charged for the services. |
| In case where the provision of service is for a consideration not wholly or partly consisting of money | Such amount of money as, with the addition of the service tax charged, is equivalent to the consideration. |
| In case where the provision of service is for a consideration which is not ascertainable | Amount as may be determined in the prescribed manner. |

The word 'consideration' has been defined as any amount that is payable for the taxable services provided or to be provided. Hence by no stretch it can be considered that the state VAT collected from the customers is an amount payable towards services provided or to be provided. Therefore in our view it cannot be included the value of taxable services. Further, Rule 2A of the Service Tax (Determination of Value) Rules, 2006, which provides for manner of determination of '*value of service portion involved in the execution of works contract'*s pecifically provides that while determining the 'Gross amount charged' or 'Total amount charged' the value added tax or sales tax paid shall not be included.

**VAT**

Under sales tax/VAT laws, the tax is leviable on the 'sale price' of the goods. The said term has been defined under the Rajasthan Value Added Tax Act, 2003 is as follows:

*"sale price" means the amount paid or payable to a dealer as consideration for the sale of any goods less any sum allowed by way of any kind of discount or rebate according to the practice normally*

*prevailing in the trade, but inclusive* ***of any statutory levy or any sum charged for anything done by the dealer in respect of the goods or services rendered at the time of or before the delivery thereof, except the tax imposed under this Act"***

Hence, it can be inferred that all statutory levies are includible on the 'sale price' for the purposes of levy of Rajasthan VAT. However, it can be argued that statutory levies in relation to goods alone form a part of 'sale price'.

At this instance it is pertinent to mention that on an application filed u/s 84 of the Delhi Value Added Tax Act, 2004 (DVAT Act), the Hon'ble Commissioner, Department of Trade and Taxes, New Delhi, has observed that in terms of the definition of sale price' under section 2(zd) of DVAT Act[3], VAT is to be charged on basic amount and not on the service tax amount[4]. However, Excise and taxation department, Haryana issued a clarification stating that VAT is applicable on the service tax element also[5]. They distinguished from the view taken by Delhi on the ground that the definition of 'Sale price' under the DVAT Act is restricted to include only the amount of the duties levied or duties leviable on goods under the Central Excise Act, 1944 or the Customs Act, 1962 or the Punjab Excise Act, 1914, whether such duties are payable by the seller or any other person; however, there is no such restriction under the definition of 'sale price' under the Haryana Act[6].

The definition of 'sale price' under Haryana VAT Act is more similar to the definition under Rajasthan VAT Act, as opposed to the definition given under DVAT. Hence, on the basis of clarification issued by the Haryana Excise and Taxation Department, it can be inferred that Rajasthan VAT is payable on service tax or service tax amount is includible in the 'sale price' for the purposes of Rajasthan VAT Act.

[3] *"sale price" means the amount paid or payable as valuable consideration for any sale, including-*
*(i) the amount of tax, if any, for which the dealer is liable under section 3 of this Act;*
*(ii) in relation to the delivery of goods on hire purchase or any system of payment by installments, the amount of valuable consideration payable to a person for such delivery including hire charges, interest and other charges incidental to such transaction;*
*(iii) in relation to transfer of the right to use any goods for any purpose (whether or not for a specified period) the valuable consideration or hiring charges received or receivable for such transfer;*
*(iv) any sum charged for anything done by the dealer in respect of goods at the time of, or before, the delivery thereof;*
*(v) amount of duties levied or leviable on the goods under the Central Excise Act, 1944 or the Customs Act, 1962, or the Delhi Excise Act, 2009 whether such duties are payable by the seller or any other person; and*
*(vi) amount received or receivable by the seller by way of deposit (whether refundable or not) which has been received or is receivable whether by way of separate agreement or not, in connection with, or incidental to or ancillary to the sale of goods;*
*(vii) in relation to works contract means the amount of valuable consideration paid or payable to a dealer for the execution of the works contract;*
*less -*
*(a) any sum allowed as discount which goes to reduce the sale price according to the practice, normally, prevailing in trade;*

[4] *Re: M/s Ingram Micro India Ltd.(Order No: 258/CDVAT/2010/22 dated 18.03.2010)*

[5] *Clarification order to M/s Redington India Limited, Panchkula dated 20.08.2013*

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