Singh & Associates
ADVOCATES AND SOLICITORS

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INDIAN LEGAL IMPETUS

FOREWORD

Manoj K Singh
Founding Partner

It gives us an immense pleasure to bring forth the April 2013 Edition of our monthly newsletter "Indian Legal Impetus", summarizing the latest changes in the legal arena.

In this issue we have included for our prestigious readers articles on various topics. To start with a small discussion has been made on a new technique of analyzing a patent data. An attractive and appealing advertisement plays an important role in the promotion of any product but at times the advertiser's portrait the advertisements in a way or claims are made about a product which are far away from the reality. In order to safeguard the interest of the consumer from being misrepresented The Advertising Standards Council of India has introduced a mechanism known as "**Code for Self Regulation in Advertising**". An attempt has been made to discuss the important features of this code in this present issue of our newsletter.

Is income of high end educational institutions especially schools run by any non-charitable organization is taxable? Since long this remains a debatable issue, we have tried to discuss this issue by analyzing various judicial pronouncements. Similarly articles have been included with respect to taxation of income from House Property, Amendment in the Drugs and Cosmetic Rule with respect to compensation to Clinical Trial victims, etc.

There is an article on "Put Option" right given in merger or PE deals and how far such rights are binding in law. The present newsletter contains an article discussing the taxation of income earned by Foreign Universities from running their education courses in India.

We sincerely hope that our esteemed readers find the information furnished through this newsletter useful. We welcome all suggestions, opinions, queries or comments from our readers. You can also send your valuable insights and thoughts at ***newsletter@singhassociates.in***.

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DATA MINING AND VISUALIZATION APPROACH IN PATENT NETWORK ANALYSIS

Saipriya Balasubramanian

Patents are extremely important in developing business strategy of technological companies. Data Mining and visualization is a powerful technique for analyzing and showing technology landscapes of vast patent data. Such a technique manipulates patent data in order to aid business and research & development decisions and to protect intellectual property rights[1].

IMPORTANCE OF PATENT DATA

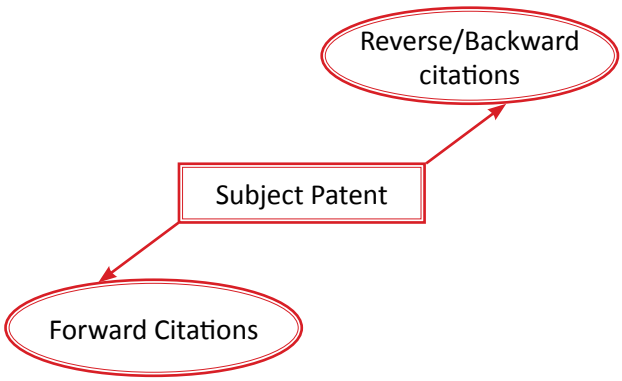
Innovation and technology are the two pillars contributing to the growth of a society. Patents are filed by a range of parties from individuals to small organizations and research institutions. Patent data are available to the public through various Government databases and commercial databases that allows for a searchable database of in both English and non-English patent applications.

The major importance of patents are they can provide legally important information on various aspects of a patent namely the Inventor's details, Assignee's details, type of technology, date of invention, Priority details, Family details, Geographical distribution of a patent and so on. This information are of tremendous value to the owners of patents, their competitors and for the stakeholders interested to invest either financially or intellectually in key technological areas.

PATENT NETWORKS AS A KEY FOR IDENTIFYING THE NICHE PATENTS

Patent Networks is one of the different data mining and visualization techniques available to search download and analyze patents data. A patent network signifies the relationships between inventors and companies in the form of an interconnected network. In developing a patent network, patent citation data are utilized. A network of patents signifies that the patents in the centre of the network have more influence and hence are important than the patents which are at the edge of the said network. A sample patent network developed using patent citation data, on different treatments available to treat Alzheimer's disease reveals the relationships between the patents and the patent applications in the technology. Other information obtained from the network are relative importance of different patents, leading researchers, companies and their contribution in the various therapeutic sectors.

LOGICS BEHIND ADOPTING 'CITATIONS' STRATEGY



Patent applications and granted patents contain information of patent citations. 'Citations' are documents that are linked together wherein one documents mentions another document as having related content2. A 'reverse' or 'backward' citation is the one which in which previously or earlier published patents are referenced in a subject patent. A 'forward citation' is the one in which the subject patent will be referenced by the subsequently published patents.

Examples If Patent A (2010) is cited by Patent B (2013)
Then:
Patent A is a backward citation of Patent B
Patent B is a forward citation of Patent A

To make an individual assessment of large number of patents is cumbersome and highly error prone task. Therefore, a better solution is to rely on other people's views of patents. Forward citation serves as an excellent key in obtaining other people's views of a given patent. The citation system works in way that if a patent applicant or patent examiner has cited an earlier patent, it reflects the importance/relevance of that particular patent. For the aforesaid reason, either the number of

forward citations is used an indicator of patent quality, or when combined with other data such as the number of family members, the number of reverse citations, the numbers of authors and other patent data yield quality results.

LIMITATIONS OF THE CITATION STRATEGY

- Forward citation yields a simple number count which is not sufficient in analyzing the quality of the patent from which a forward citation has come.
- Since the end result from a forward citation is merely a simple number, this number does not reflect any information on how different patents relate to each other.

Advantages of using citation strategy for developing a Patent Network Model:

- The relationships among patents can be viewed as a visual network and therefore aids the analyst in intuitively understanding the overall technology.
- Patent network analysis takes diverse keywords into account and produces more meaningful indicators. Network analysis employs a number of parameters hence an exhaustive search is performed and quality results are obtained.
- Patent Network Analysis is more economical in terms of time and cost, mainly because original random set of documents are transformed into structured data through data mining and visualization technique.
- The network established by patent citations allows one to trace the flow of technology through time, from patent to patent, and across fields.
- Patent citation strategy used in patent network analysis aids in analyzing technological spillover effects, the impact or influence of individual patents, the rates of technological development, and other such issues. ◆◆◆

1. http://www.innovationmanagement.org/Wiki/index.php?title=Patent_Analysis
2. http://www.intellogist.com/wiki/Citations

ADVERTISEMENT STANDARD CODE OF INDIA – CONTROLLING THE CONTENTS OF ADVERTISEMENTS IN INDIA

Rajdutt S Singh & Mrinali Mudoi

Advertising, generally speaking, is the promotion of goods, services and ideas, usually performed by an identified sponsor. Marketers see advertising as part of an overall promotional strategy. Other components of the promotional mix include publicity, public relations, personal selling, and sales promotion.

The Advertising Standards Council of India (ASCI), established in 1985, a body committed to the cause of Self-Regulation in Advertising, ensuring the protection of the interests of consumers to maintain and enhance the public's confidence in Advertising.

This write up attempts to explicate the initiative taken by ASCI in controlling and promoting the concept of fair advertising practices in India and its impact on the advertisements prevailing in the Pharmaceutical Sector at present.

In regards to promote fair practices of advertisement in the Indian market and protect the right of customers as guaranteed under the Consumer Protection Act, 1986, ASCI had come up with the regulatory mechanism termed as "Code for Self-Regulation in Advertising"["Code"] with the prime objectives to identify and control the content of advertisements so that they are not offensive and illegal in nature and should not intent to misrepresent the customers so as to achieve fair advertising practices in the scenario of Indian market by ensuring the following basic guidelines:-

- To ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguards against misleading advertisement.
- To ensure that advertisements are not offensive to generally accepted standards of public decency.
- To safeguard against the indiscriminate use of advertising for the promotion of products which are regarded as hazardous to society or to individuals to a degree or of a type this is unacceptable to society at large.
- To ensure that advertisements observe fairness in competition so that the consumer's need to be informed on choices in the market-place and the canons of generally accepted competitive behavior in business is both served.

The code brings into its purview all those advertisers, advertising agencies, media or such other individuals who commission, create, place or publish any advertisement or assist in the creation or publishing of any advertisement which is in contravention of this Code and applies to advertisements read, heard or viewed in India even if they originate or are published abroad so long as they are directed to consumers in India or are exposed to significant number of consumers in India.

The Code is divided into IV chapters and the onset of it defines "advertisement", "product", "consumer", "advertiser","advertising agency","media", etc. The Code not only includes all form of paid- for communication, addressed to the Public or a section of it but does not exempt even those form of communication which is carried free-of-charge for any reason in the normal course which is recognized as an advertisement by the general public. Hence, advertisers or advertising agency or media or any such related person cannot defend himself/itself from the purview of the Code on the ground that he/it was not indulged in a communication for commercial promotion of any product and the communication was meant only for general reference.

ASCI AND ITS REACH ON PHARMACEUTICAL/ ALLIED HEALTH CARE INDUSTRY

Recently ASCI upheld approximately 36 complains in the category of Pharmaceuticals companies and Healthcare sector held for violation of the Code.

In an advertisement of the pain relief ointment Volini, Ranbaxy Laboratories Ltd. claimed as "99% doctors

1. Refer to the heading "Declaration of fundamental Principal" of the code; available at http://www.ascionline.org/index.php/ascicodes.html, last visited on 18th May, 2013.

have used Volini to relieve their pain" and "Volini No.1 doctors' prescribed pain reliever since last 12 years".

Dabur India Ltd's Dabur Chyawanprash print ad claimed that "Dabur Chyawanprash provides 3 times more immunity","Helps improve the ability to fight illness by 3 times","ONLY Dabur Chyawanprash provides immunity

In the above matters, the advertiser was not able to substantiate the claim with necessary support and data and the ad were considered as contravention of the Code.

THE NATIONAL ADVERTISING MONITORING SERVICE (NAMS)

In order to maintain a track on misleading advertisements which harm the interests of consumers, ASCI announced an initiatives of a mechanism called National Advertising Monitoring Service (NAMS) which will work in partnership with TAM Media Research and will identify advertisements which are in potential violation of Chapter 1 of ASCI Code and will monitor ads in the sectors covering Auto, Banking, Financial Services & Insurance, FMCG (including F&B), Consumer Durables, Educational Institutions, Health Care Products & Services, Telecom and Real Estate sectors. The scope of work will cover the tracking of more than 30 newspapers (all editions) which contribute to over 80 per cent of national newspaper readership and all TV channels in all Indian languages. The mechanism will work on three-fold steps initiating from tracking advertisements that is seen as being potentially violating Chapter 1 of ASCI Code which will then be forwarded to ASCI on a weekly basis, post which ASCI would process them according to its normal complaint procedure involving its Consumer Complaints Council (CCC) for adjudication.

Keeping in view the initiatives undertaken by ASCI in the recent past and irrespective of the fact that the Code introduced by ASCI is voluntary in nature, the advertisers ought to give regard to such Code at the time of publishing their advertisements since if any advertiser fails to comply with the CCC decision in writing on a complaint upheld against a Press Ad, the ASCI has option to inform the Press Council of India and Ministry of Information & Broadcasting about the print Ad contravening the ASCI Code and such action may dent the reputation of the concerned advertiser. ◆◆◆

VALIDITY OF OPTIONS IN PRIVATE EQUITY FINANCING

Karan Gandhi & Arbaaz Husain[1]

Option contracts have been an integral part of the Merger, Private Equity (PE) Deals in India since the liberalization of the Indian Economy. Indian corporate have been using options to structure their deals, raising finances from the foreign lenders. The foreign lenders entering in India want to secure their interest in the Company. In order to secure the interest, the common features which are seen in the Agreements and contracts are the pre-emption rights for the investor in the form of Right of First Refusal, Tag Along Rights, Drag Along Rights, etc.

Apart from the above, an important aspect for a foreign investor is the 'return' which it will get from the investment made in India. In case of unlisted companies, it has been generally seen that PE secures its exit through Initial Public Offering or the buy back of shares or the purchase of the equity investment of the Foreign Investor by the promoters. The Agreements are so designed that such Agreements provide a 'PUT' option to the Foreign Investor in order to secure the return on its investment. However, in some cases, the promoters also have a CALL/PUT option under which, promoters can buy out the stakes of the foreign investor at their option. Over the years the legality of the Options in the PE Agreements has been discussed by various forums. In India, the options transactions are regulated under the provisions of Securities Contract Regulation Act, 1956 (SEBI) and Securities Exchange Board of India Act, 1992 (SCRA).

LEGAL POSITION

SCRA & SEBI

The Regulator, SEBI has been of the strong view that the options are not a spot delivery contracts but Forward contracts. SEBI on various occasions has clarified that call options and put options are illegal because of the following two reasons

- Firstly, these contracts cannot be considered as valid derivative contracts as they can only be traded on stock exchanges and not through private contracts between parties.[2]
- Secondly, this privately contracted option gives the parties the right to put or call at a future date which makes it an invalid 'spot-delivery' contract under s.2 (i) of SCRA.

The SEBI in its informal guidance note given to Vulcan Engineers Ltd[3] relating to the purchase and sale of shares of the company at a pre agreed price under the PUT/Call Options stated that:

> *'As [this] (put / call) option would be exercised in a future date…the transaction would not qualify as a spot delivery contract under SCRA S. 2(i), nor as a legal and valid derivative contract in terms of S. 18A.'*

Also, in the *Cairn-Vedanta deal*[4] SEBI was of the view that put option and call option arrangements and the Right of First Refusal do not conform to the requirements of a spot delivery contract nor with that of a contract of Derivatives as provided under section 18A of the Securities Contracts (Regulation) Act, 1956. Also, put option and call option arrangement along with the right of first refusal are in violation of Notification No. SO 184(E) dated March 1, 2000 issued by SEBI.

SEBI in its view clearly provided that the Options not being the spot delivery contracts are prohibited in terms of SEBI Notification No. SO 184(E) dated March 1, 2000.

The SEBI Notification No. S.O 184(E) (1 March 2000) reads as "*that no person in the territory to which the said Act extends, shall, save with the permission of the board, enter into any contract for sale or purchase of securities other than such spot delivery contract or contract for cash or hand delivery or special delivery or contract in derivatives as is permissible under the said Act.*"

1. Intern
2. S. 18A, Securities Contracts (Regulations) Act (1956).
3. Available at http://www.sebi.gov.in/informalguide/Vulcan/sebilettervulcan.pdf.
4. Available at http://www.sebi.gov.in/takeover/cairnlof.pdf.

Bombay High Court in the case of Niskalp Investments & Trading v. Hinduja TMT Ltd[5], held that "*an agreement for buying back the shares of a company in the event of certain defaults was hit by the definition of spot-delivery contract under the SCRA and hence, unenforceable.*"

On the contrary, Bombay High Court in the case of MCX Stock Exchange Limited v. Securities & Exchange Board of India & Ors[6] held as follows:

"*In the case of an option, a concluded contract for purchase or repurchase arises only upon the exercise of the option. Under the notification that has been issued under the SCRA, a contract for the sale or purchase of securities has to be a spot delivery contract or a contract for cash or hand delivery or special delivery. In the present case, the contract for sale or purchase of the securities would fructify only upon the exercise of the option … in future. If the option were not to be exercised by them, no contract for sale or purchase of securities would come into existence. Moreover, if the option were to be exercised, there is nothing to indicate that the performance of the contract would be by anything other than by a spot delivery, cash or special delivery.*"

The Hon'ble Bombay High Court in MCX case (Supra) took the contrary view from the Judgment pronounced in Niskalp case (Supra). According to the Court, once a contract is arrived at upon the option being exercised, the contract would be fulfilled by spot delivery and would, therefore, not be unlawful. However, against the said order of the Hon'ble Bombay high Court, SEBI preferred an appeal before the Hon'ble Supreme Court of India. Hon'ble Supreme Court of India in such appeal held that it is needless to say, in making amendments in the Regulation, SEBI shall not be bound by any observations or comments made by the High Court in the impugned judgment.

RESERVE BANK OF INDIA

The Reserve Bank of India (RBI) has also raised its concern for the usage of put and call options on various occasions. According to RBI an investment made by a foreign investor which is backed by a put option at a pre-decided internal rate of return can neither be considered as an equity investment nor as a foreign direct investment, but is instead a debt investment. The reason behind this is that it is a guaranteed exit at a guaranteed price which according to RBI is equivalent to an external commercial borrowing.[7]

Also, in case the fixed return is offered on an equity instrument, such instrument would lose its character as equity and may be classified as debt.

RECENT DEVELOPMENT

Recently the Law Minister of India has cleared the position as to the options in the Private Equity and Merger deals in India. The Law Ministry has cleared the proposal for approval of the options in the agreements of the PE deals in India. Once notified, Indian Companies would be able to use options to structure mergers & acquisitions and PE arrangements. The said move is anticipated to render peace of mind to the foreign investors looking for such options in their transactions and it is also expected to encourage the foreign investors to enter in India and seek the agreeable returns.

CONCLUSION

In the light of the recent development, once notified, it would be clear that the matter of CALL/PUT options under M&A and PE Deals would be free from judicial controversy. The only aspect to look forward is that whether the said change when enacted would be applicable prospectively or retrospectively. In both the cases, there would be challenges and opportunities for the companies as well as investors. Also, a very important aspect of Foreign exchange management act, 1999 would have to be considered as allowing the change might also require the change ion the Foreign exchange management laws in order to differentiate the character of equity from debt. ◆◆◆

5. (2008) 143 CompCas 2004 (BOM)
6. 2012 (114) BomLR 1002
7. Corporate exits, Queuing up to leave, India Business Law Journal, 20 (July/August 2012).

'EDUCATION' IS AN OBJECT, CHARITABLE PER SE UNDER THE I.T ACT

Shipra Makkar

It is often a topic of dispute amongst the various judicial authorities that whether the high end educational institutions, especially schools, providing modern and equipped educational aids, maintaining the highest standards of hygiene, offering air-conditioned classroom, buses etc. are involved in activities which are charitable or commercial in nature.

Both starting from the word 'C', but still carry a huge difference while considering from the point of view of taxation. The income of a charitable trust or a society under whose aegis these schools run is exempt from Income tax according to the provisions of Section 11, 12 and 13of the Income Tax Act. However, to avail the said exemption, the activities of such trust/society should fall within the definition of 'Charitable purpose' as defined U/s 2[15] of the Income Tax Act.

Here, it shall be worth quoting Section 2[15] which is defined to include *relief of the poor, education, medical relief, [preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest] and the advancement of any other object of general public utility*.

There are many judicial pronouncements which have covered this dispute, however taking contradictory views.

Analyzing the scheme of the Act in the context of tax liabilities of a Chamber Commerce, the Hon'ble Apex Court has observed in the case of **Indian Chamber of Commerce Vs. Commissioner of Income Tax [101 ITR 0796]** that "*Income is taxable., but certain incomes shall not be included in the total income of the previous years if the person in receipt of income*." Emphasizing on the element of "Non Profit": to availing the exemption under the Act, the Hon'ble Supreme Court further observed as under:- "it may be noted here that though subsequent amendments to Section 2[15] has further restricted the extent to which such fees can be charged, there is no dilution in the underlying principle that in Section 2[15] the benefit of exclusion from total income is taken away when in accompanying a charitable propose the institution engages itself in activities of profit. Their objects are charitable but their activities are for profit."

However the said judgment has been overruled by the 5 bench judgment in **Additional Commissioner of Income Tax Gujrat V. Surat Silk Cloth Manufacturers Association reported in [1980] 2 SCC 31,** wherein the majority view has been taken that "*the words 'not involving the carrying on of any activity for profit" qualify or govern only the last head of charitable purpose and not the earlier three heads. Where therefore the purpose of a trust or institution is relief of poor, education, medical relief, the requirement of the definition of 'charitable purpose' would be fully satisfied, even if an activity for profit is carried on in course of the actual carrying out of the primary purpose of the trust or institution.*"

In the case of **Society for Small Medium Exporter vs. DIT [Exemption] Delhi,** Hon'ble ITAT Delhi has held that the "*DIT exemption was right in refusing registration to the assessee as even though the objects of the society may have been charitable, but, the activities carried out by the society which yielded income to the society were commercial in nature. Applicability of the proviso to section 2(15) was upheld in this case.*"

It is also noted that while deciding on whether an educational institution charging the high fees can be termed as a "charitable institutions"; the Hon'ble Chennai ITAT in the case of **M/s Rajah Sir Sannamalai Chettiar Foundation Vs. The Director of income Tax [Exemptions] ITA NO. 2927/Mds./2010** has observed as under: "*the definition clearly shows that carrying on educational activities by itself is not a charitable purpose. The concept of charitable purpose may be manifested in different forms like relief of the poor, education, medical relief, etc, but a charitable purpose should always take care of the welfare and interest of the public and especially the poor section of the public. Running schools by collecting huge amounts of fees with five star facilities cannot be treated as charitable activity only on the ground that the business carried on by such institutions is the business of education.*"

The Hon'ble Uttrakhand High Court in the case of **CIT Haldwani v M/s Queens Education Society, Nainital & St Paul Sr. Sec School, Nainital** in ITA no. 105/104/2007 has held that "*educational institutions making systematic profits are not eligible for exemption*".

In the case of **Punjab Urban Planning and Development Authority,** ITAT Chandigarh has observed that "*no activity can be carried on efficiently, properly unless and until carried out on business principle but it does not mean that the provision is misused in any manner under the garb of charity and any institution be allowed to become richer and richer under the garb of by making it a non tax payable organization. A charitable institution provided services for charitable purposes free of cost and not for gain*".

However taking a contrary view there are many instances wherein the courts after careful reading of the definition of Charitable purpose in the Act have observed that "…*Where, therefore, the purpose of a trust or institution is relief of the poor, education or medical relief, the requirement of the definition of "charitable purpose" would be fully satisfied, even if an activity for profit is carried on in the course of the actual carrying out of the primary purpose of the trust or institution.*"**[Victoria Technical Institute Vs. Addl. Commissioner of Income-tax, Madras** and another reported in **AIR 1991 SC 997]**

The Hon'ble ITAT Delhi 'F' Bench in **Dy. CIT v. Beer Shiva Educational Social Welfare Society reported in [2007] 103 ITD 403 [Delhi]** while discussing the definition of the word "Charitable Purpose" under Section 2 [15] of the Income Tax Act has held that:"*relief of poor, education and medical relief are charitable activities per se and if any institution is carrying out any of these objects, then, such an institution would be pursuing a charitable purpose.*"

"Charitable purpose" includes relief of poor, education, medical relief, and the advancement of any other object of general public utility. Before proceeding further, it may be pointed out that the words "not involving the carrying on of any activity of profit", finding place in the section at the end of the words "objects of general public utility", were omitted by the Finance Act, 1983, with effect from 1-04-1984. Therefore, the cases relied upon under the old definition will not come to the aid of the revenue. This definition does not make a distinction between the institutions carrying on any activity for profit or nonprofit institutions. It is further seen that punctuation, and the word "and" are used after medical relief and, therefore, the words "relief of poor, education, medical relief stand on different footing than the words "advancement of any other object of general public utility". The Hon'ble Supreme Court has pointed out that private profit motive is manifestly excluded by the words "general public utility", but these words qualify the words "advancement of any other object". Therefore, we are of the considered view that relief of poor, education and medical relief are charitable activities per se and if any institution is carrying out any of these objects, then, such an institution will be pursuing a charitable purpose."

The case of **Addl. CIT v. Surat Art Silk Cloth Manufacturers Association reported in (1980) 121 ITR 1,** from which it is evident that the test of predominant object of the activity is to be seen whether it exists solely for education and not to earn profit. However, the purpose would not lose its character merely because some profit arises from the activity. That, it is not possible to carry on educational activity in such a way that the expenditure exactly balances the income and there is no resultant profit, for, to achieve this, would not only be difficult of practical realization but would reflect unsound principles of management. In order to ascertain whether the institute is carried on with the object of making profit or not it is the duty of the prescribed authority to ascertain whether the balance of income is applied wholly and exclusively to the objects for which the applicant is established.

The Hon'ble High Court of Punjab and Haryana at **Chandigarh in Pinegrove International Charitable Trust Vs. Union of India and Others reported [2010] 230 CTR [P&H] 477** has categorically held that "*it is obligatory on the part of the Chief Commissioner of Income Tax or the Director, which are the prescribed authorities, to comply with proviso thirteen [un-numbered]. Accordingly, it has to be ascertained whether the educational institution has been applying its profit wholly and exclusively to the object for which the institution is established. Merely because an institution is earning profit would not be deciding factor to conclude that the educational institution exists for profit.*"

Hon'ble High Court of Delhi in **St. Lawrence Education Society [Regd] and Anr. V. Commissioner of Income Tax Delhi [Central] and Anr. The Baptist Education Society and Anr. Vs. Chief Commissioner of Income Tax reported in [2011] 197 TAXMAN504 [Delhi]** while deciding the appeal and discussing various authorities on the said subject, allowing the Writ petition held that "*the opinion expressed by the respondent that the educational institution seeking exemption should not generate any quantitative surplus is legally untenable and incorrect. The chief Commissioner has erred in assuming that for exemption there should not be any surplus;*

otherwise the institution society exists for profit and not charity i.e education in the present case. In view of the aforesaid judgments of the Supreme Court, Bombay High Court and Punjab and Haryana High Court, reasoning inscribed by the competent authority solely on the foundation that there has been some surplus profit is unjustified."

Nevertheless, here, it is pertinent to bring to notice a clarification issued by the Board in Circular No. 11/2008 dated December 19, 2008, which further elucidates the picture and most likely to settle the dispute on the issue which states as under.

"The amendment made by the finance Act, 2008 will not apply in respect to the first three limbs of Section 2[15]. Consequently, where the purpose of a trust or institution is relief for the poor, education or medical relief, preservation of environment and preservation of monuments, it will constitute 'Charitable Purpose' even if it incidentally involves the carrying on of commercial activities.

Relief of the poor' encompasses a wide range of objects for the welfare of the economically and socially disadvantaged or needy. It will, therefore, include within its ambit purposes such as relief to destitute, orphans or the handicapped, disadvantaged women or children, small and marginal farmers, indigent artisans or senior citizens in need of aid. Entities who have these objects will continue to be eligible for exemption even if they incidentally carry on a commercial activity, subject, however, to the conditions stipulated under section 11(4A) or the seventh proviso to section 10(23C) which are that

(i) the business should be incidental to the attainment of the objectives of the entity, and

(ii) separate books of account should be maintained in respect of such business.

Similarly, entities whose object is 'education' or 'medical relief' would also continue to be eligible for exemption as charitable institutions even if they incidentally carry on a commercial activity subject to the conditions mentioned above.

The newly inserted proviso to section 2(15) will apply only to entities whose purpose is 'advancement of any other object of general public utility' i.e. the fourth limb of the definition of 'charitable purpose' contained in section 2(15). Hence, such entities will not be eligible for exemption under section 11 or under section 10(23C) of the Act if they carry on commercial activities. Whether such an entity is carrying on an activity in the nature of trade, commerce or business is a question of fact which will be decided based on the nature, scope, extent and frequency of the activity."

Here, it shall also be important to note that this circular in the light of Section 119 of the I.T Act and in light of the case of **Catholic Syrian Bank Ltd. Vs. Commissioner of Income Tax, Thrissur [MANU/SC/0127/2012]** is binding on the Income Tax Authorities.

Considering the discussion above, it can be inferred that schools imparting education, even if earning some amount of profits and charging high fees shall still be said to be engaged in charitable activities. Meaning thereby entities whose object is Education would continue to be eligible for exemption as charitable institutions even if they incidentally carry on commercial activities and Education as an object is charitable per se under the Indian Income Tax Act. ◆◆◆

REVERSE CHARGE MECHANISM IN LIGHT OF SPECIAL ECONOMIC ZONES

Smeeksha Bhola

Service tax is one of the indirect taxes, where the service provider is required to collect tax on the services rendered by him and deposit the same with Government. Section 68(1) of the Finance Act makes such a provision, according to which, "every person providing a taxable service to any person shall pay service tax at the rate specified, in such manner and within such period as may be prescribed ".

However, an exception to the above rule has been provided by Section 68(2), which provides that "in respect of such taxable services as may be notified by the Central Government in the Official Gazatte, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66B and all the provisions of this chapter shall apply to such person as if he is the person liable for paying service tax in relation to such service". This is termed as reverse charge, since in such case service recipient is liable to pay service tax instead of service provider.

In case a service recipient is required to make partial payment of tax, then such mechanism is termed as Partial Reverse Charge Mechanism. The Central Government has vide Notification No. 30/2012-ST, dated 20.06.2012, as amended by Notification No. 45/2012-ST dated 7.08.2012 notified some services under the Partial Reverse Charge Mechanism, wherein Service recipient is required to pay tax, these are as follows:

S. No.	Description of a service	Percentage of service tax payable by the person providing service	Percentage of service tax payable by the person receiving the service
1.	In respect of services provided or agreed to be provided by an insurance agent to any person carrying on insurance business	Nil	100%
2.	In respect of services provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road	Nil	100%
3.	In respect of services provided or agreed to be provided by way of sponsorship	Nil	100%
4.	In respect of services provided or agreed to be provided by an arbitral tribunal	Nil	100%
5.	In respect of services provided or agreed to be provided by individual advocate or a firm of advocates by way of legal services	Nil	100%
5A.	In respect of services provided or agreed to be provided by a Director of a company to the said company	Nil	100%
6.	In respect of services provided or agreed to be provided by Government or local authority by way of support services excluding,-(1), renting of immovable property, and (2) services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act, 1994.	Nil	100%

7.	(a) In respect of services provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers on abated value to any person who is not engaged in the similar line of business. (b) In respect of services provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers on non abated value to any person who is not engaged in the similar line of business.	60%	40%
8.	In respect of services provided or agreed to be provided by way of supply of manpower for any purpose [or security services]	25%	75%
9.	In respect of services provided or agreed to be provided in service portion in execution of works contract.	50%	50%
10.	In respect of any taxable services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory	Nil	100%

SERVICE TAX ON UNITS LOCATED IN SPECIAL ECONOMIC ZONES (I.E. SEZ)

- The Central Government, as per Notification No. 40/2012-ST, dated 20.06.2012 [hereinafter referred to as the "Said Notification"] has exempted the services on which service tax is leviable under section 66B of the said Act, received by a unit located in a Special Economic Zone (hereinafter refereed to as SEZ) or Developer of SEZ and used for the authorized operations, from the whole of the service tax, education cess and secondary and higher education cess

- However, the exemption contained in the Said Notification shall be subject to the following conditions, namely-

(a) The exemption shall be provided by way of refund of service tax paid on the specified services received by a unit located in a SEZ or the developer of SEZ and used for the authorized operations:

Provided that where the specified services received in SEZ and used for the authorized operations are wholly consumed within the SEZ, the person liable to pay service tax has the option not to pay the service tax ab intio instead of the SEZ unit or the developer claiming exemption by way of refund in terms of this notification.

Explanation- For the purposes of this notification, the expression "wholly consumed" refers to such specified services received by the unit of a SEZ or the developer and used for the authorized operations, where the place of provision determinable in accordance with the Place of Provision of Services Rules, 2012 (hereinafter referred as the POP Rules) is as under:-

(i) In respect of services specified in rule 4 of the POP Rules, the place where the services are actually performed is within the SEZ; or

(ii) In respect of services specified in rule 5 of the POP Rules, the place where the property is located or intended to be located is within the SEZ, or

(iii) In respect of services other than those falling under clauses (i) and (ii), the recipient does not own or carry on any business other than the operations in SEZ;

(b) Where the specified services received by the unit of a SEZ or developer are not wholly consumed within SEZ, maximum refund shall be restricted to the extent of the ratio of export turnover of goods and services multiplied by the service tax paid on services other than wholly consumed services to the total turnover for the given period to which the claim relates, i.e., consumed services to the total turnover for the given period to which the claim relates, i.e., consumed services to the

total turnover for the given period to which the claim relates, i.e.,

Refund amount= (Export turnover of goods + Services of SEZ Unit/Developer) * Service tax paid on services other than wholly consumed Services (both for SEZ and DTA)

Total turnover for the period

✦ Therefore, from above provisions as contained in the Said Notification, it can be concluded that only for services, exclusively performed in SEZ units are exempt from tax. However in case, services are partly performed in SEZ and partly outside, then only the amount of services as provided in the premises of SEZ will be exempt from service tax and will be calculated as per the formula stated above.

CONCLUSION

In case the SEZ Unit / Developer/ Co – Developer is having no other operations other than SEZ, then, there is no need to pay service tax on reverse charge mechanism and ab-initio exemption can be availed. However, in other cases, if the recipient of services, i.e. person liable to pay tax (in respect of services to which Reverse Charge Mechanism is applicable) is situated in SEZ, then the exemption/refund under the Said Notification will vary according to the place of provision of services. ◆◆◆

TAXATION ON INCOME OF FOREIGN UNIVERSITIES IMPARTING EDUCATIONAL COURSES IN INDIA

Smeeksha Bhola & Pradhumna Didwania

In We have entered into a new era of education, wherein instead of students heading abroad for pursuing their dream courses, Foreign Universities are offering such courses in India. Every set of change or evolution is not complete without its unique set of complications. One such complication in respect Foreign Educational Institutions entering into collaboration with Indian Educational Institutions and providing education to Indian students by way of Distance Learning or Full time course, is in respect of taxation on income earned by such Foreign University. The present article highlights various aspects of such taxation of the aforesaid remittance income.

RELEVANT PROVISIONS OF INDIAN INCOME TAX ACT, 1961

In order to determine the tax liability on Income of a Foreign University in India, following provisions of the Income Tax Act, 1961, needs to be discussed:

1. As per Section 4 of the Income Tax Act, 1961, Income tax is chargeable in respect of "total income" of every "person". Section 4 of the Income Tax Act, 1961 can be read as follows :

(i) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person :

Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.

(ii) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act.

2. A Foreign University falls within the definition of person as given under part (vii) of sub-section (31) of section 2 of the Income Tax Act, 1961, as per the said definition, person includes the following:

(i) an individual,
(ii) a Hindu undivided family,
(iii) a company,
(iv) a firm,
(v) an association of persons or a body of individuals, whether incorporated or not,
(vi) a local authority, and
(vii) ***every artificial juridical person, not falling within any of the preceding sub-clauses***

3. Further, a Foreign University is a non-resident entity as per sub-section (4) of section 6 of the Income Tax Act, 1961, which states as follows:

"*Every other person is said to be resident in India in any previous year in every case, except where during that year the control and management of his affairs is situated wholly outside India*"

4. Scope of 'total income' in case of non-resident is provided under section 5 of the Income Tax Act, 1961 and includes income of a non- resident which is received in Indian or accrues or arises in India, which states as follows:

"Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

a. is received or is deemed to be received in India in such year by or on behalf of such person ; or

b. accrues or arises or is deemed to accrue or arise to him in India during such year.

5. As per Section 195 of the Income Tax Act, 1961 person responsible for making payment to a non-resident is liable to deduct Tax on the same in the form of Tax Deducted at Source (TDS). The relevant text of Section 195 can be read as follows:

"*Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or any other sum chargeable under the provisions*

of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

Explanation 2.—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

(i) a residence or place of business or business connection in India; or

(ii) any other presence in any manner whatsoever in India."

From the above provisions of Income Tax Act, 1961, it can be interpreted that all income received or deemed to be received in India on behalf of a Foreign University will be taxable in India as per the provisions of Indian Income Tax Act, 1961. Further tax will be deducted at source at the time of remittance of such Income to the Foreign University.

FOREIGN UNIVERSITIES AND DOUBLE TAXATION AVOIDANCE AGREEMENTS

India has entered into Double Taxation Avoidance Agreements [DTAA]with many countries, and if a Foreign University is a resident of such country, with which India has entered into a DTTA, then provisions of such DTAA also need to be taken into consideration, before commenting on the taxation status of Income of such foreign University in India. Since many Universities of UK are running educational courses in India, let's take example of DTAA entered into between India and UK, an Income earned by a Foreign University can either be covered under the head "business profits" or "royalty income", some of the relevant provisions of the DTAA between India and UK in this context are as follows:

1. **Business Profits:** As per sub-clause (1) of Article 7 of the DTAA between India and UK, "*The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enter price may be taxed in the other State but only so much of them as is directly or indirectly attributable to that permanent establishment".*

Further, Permanent Establishment is defined under Article 5 of the DTAA as "*a fixed place of business through which the business of an enterprise is wholly or party carried on.*"

2. **Royalty:** As per Article 2 of the DTAA, "*Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State*"

Further, part (3) of Article 2 further defines "royalties" as:

a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and

b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

From above provisions of India- UK DTAA, it can be observed, that if "income" earned by a University of UK falls within the ambit of business profits or royalty income, then such income will be taxable in India as per the above provisions. However, in many cases the role of Indian collaborative partner of a Foreign University is just restricted to the extent of collecting education fee for courses remitted by such Foreign University in India and remitting the same to its foreign collaborative partner. In such cases, it is difficult to categorize such collection and remittance either as "business profits" and "royalty income".

One of the Landmark case discussing the taxation of education fee earned by Foreign educational institutes by imparting educational courses in India is the case of M/s Hughes Escort Communications Ltd V/s DCIT, Circle 2(2) [ITA No: 752/Del/2005]

In this case, it was held that when role of the Indian Company was merely to enroll students, and provide the infrastructure by way of computer broad band access VSAT connectivity etc for accessing course material in the class room and there is no use of Trademark by the Indian Company, the payment made by the Indian Company will not be treated as royalty and there is no business profit hence no TDS has to be deducted on the same. The observations made in the aforesaid judgment are as follows:

"The role of the assessee is merely to enroll students, and provide the infrastructure for accessing course material in the class room. The assessee as discussed above as per the Affiliate Agreement is to provide infrastructure. Considering the respective stand of the parties before the Bench in regard to whether the payment is Royalty under Article 12 of the Indo- US DTAA it is necessary at this juncture to consider the said Article. For ready reference the same is reproduced hereunder from paper book page nos. 57 to 58 wherein copy of the same is placed by the assessee

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On a careful perusal of the above it is seen that the nature of payment made to eCornell is not 'royalty' as the payment is not for the use or the right to use any copy right or literary work. The fact that it is not for artistic, scientific work, work on film, tape, radio, television, broadcasting etc. does not arise. It is also not for use or right to use patent, trade mark, design, plan, secret formula or process etc. It is purely and simply a case of pooling of resources by way of an Affiliate Agreement wherein the respective roles and responsibilities have been assigned and the arrangement being of the nature of pooling of resources where fee sharing of the two parties have been set out this is not a case where any payment is being made to eCornell by the assessee for any kind of service as it is purely a case of apportioning of fees attributable to eCornell as per the Affiliate Agreement being remitted to eCornell and the portion of the fees collected for providing enrollment infrastructure in order to access the study material by the students is retained by the assessee as its share. As such on facts the present case does not partake the nature of royalty as contemplated under Clause 3(a) of Article 12 of the Indo-US DTAA.

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CONCLUSION

From the above discussions, it can be concluded that if Income earned by a Foreign University in India falls within the ambit of business profits or royalty income, then such Income is taxable in India. However, many times such simple categorization of Income is not possible and there may be situations when such income cannot be said to be either business profits or royalty income. One such situation is where, role of Indian collaborative partner of a Foreign University is just restricted to the extent of collecting education fee for courses remitted by such Foreign University in India and remitting the same to its foreign collaborative partner. In such cases, it is difficult to categorize such collection and remittance either as "business profits" and "royalty income" and therefore taxation of such Income is still an open ended question. ◆◆◆

INCOME FROM HOUSE PROPERTY - WHAT TO TAX AND WHAT NOT TO TAX?

Taxation Team

Prepayment charges paid for early closure of loan, whether to be allowed as deduction under the Income-tax Act, 1961 or not? This question has arisen many times, however the Mumbai Bench of Income- tax Appellate Tribunal has finally given an affirmative answer on this issue in the case of **Windermere Properties Pvt. Ltd. v. DCIT.**[1]

BRIEF FACTS OF THE CASE

In the present case, a loan was taken by the taxpayer for acquisition of property from the HDFC Bank. In the assessment year 2006-07, the taxpayer repaid the entire loan amount. While calculating the 'Income from House Property', the prepayment charges were claimed as deduction. However, during the assessment, deduction claimed by the taxpayer with respect to the prepayment charges was disallowed as deduction, according to the assessing officer, such charges do not qualify as a deduction and only the interest paid on the loan should be allowed for deduction.

ISSUE

Whether the prepayment charges for foreclosure of loan is deductible under the head Income from House Property?

OBSERVATIONS OF THE TRIBUNAL:

1. The Tribunal deliberated in detail the definition of interest as contained in Section 2(28A) of the Income Tax Act of 1961, which is stated as follows:

"interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized.

According to the above definition of 'interest', it can be interpreted that not only the any sum of money paid as interest is eligible for deduction under the said section, but also any other amount/sum of money paid in relation to such debt will also qualify for deduction under this section.

2. The Tribunal observed that there was a direct link between prepayment of charges and loan availed for acquisition of property. The loan was availed by the taxpayer for acquiring a property and gradually such loan was repaid. Due to the receipt of prepayment charges, bank accepted early payment of loan. With such early payment of loan, taxpayer managed to remove the interest liability in respect of loan, which would have otherwise continued until the final payment of loan. Therefore there was direct correlation between the prepayment charges and the loan availed for acquisition of property and hence according to the tribunal, prepayment charges were to be allowed as a deduction under the head Income from House Property.

CONCLUSION

The above decision of the Tribunal is a welcome step and has been highly appreciated. Taking loan for acquiring a property is as it is a burden on general working class, by giving the term 'interest' such a wide interpretation, Tribunal has given some amount of relief to taxpayers. Taxpayers are usually required to pay substantial prepayment charges at the time of earlier payment of loan. By allowing to claim such prepayment charges as deduction while calculating Income from House Property would help in saving some amount of taxes. ◆◆◆

1. ITA No. 7192/MUM/2010, AY-2006-07, dated 22 march 2013

LATEST AMENDMENTS IN 2013 TO THE DRUGS AND COSMETICS RULE, 1945

(Insertion of Rule 122- DAB, Rule 122 DAC and Rule 122 DD in the Drugs and Cosmetics Rule, 1945)

Mrinali Mudoi

Clinical research is the key to the discovery of latest diagnostic methods and to develop modern drugs for treatment of diseases. Last year, the Government had finally given positive node to foreign pharmaceutical companies to invest in India, clinical trial is a very positive requirement to strive towards the growing developments in the present Pharmaceutical market worldwide. With that, the concept of Good Clinical Practices (GCP) has also created awareness in India which is an ethical and scientific quality standard for designing, conducting and recording trials that involve the participation of human subjects. However, in India how far such practices are a reality was a big question till some time back.

Unfortunately, till some time back, the provisions of compensation to the vulnerable subjects who suffer injury or death during participation in clinical trial of a new drug which targeted to be launch in the market by Pharma companies were silent and not covered under the Drug and Cosmetics Rule, 1945. However, the insertion of the new Rules 122-DAB, Rule 122-DAC and Rule 122 DD vide first, second and third amendments respectively have been able to fulfill the lacuna of the need of such compensatory provisions.

Insertion of Rule 122- DAB in the Drugs and Cosmetics Rule, 1945 (called as The Drugs and Cosmetics (First Amendment) Rules, 2013.[2]

Rule 122-DAB (1) lays down the requirement of providing free medical management as long as required, in the case of an injury occurring to a clinical trial subject. Further if the injury suffered by the trail subject is related to the clinical trial conducted on such subject, he or she shall also be entitled for financial compensation as per order of the Licensing Authority. In case the clinical trial results in the death of the subject, financial compensation, as per the order of the Licensing authority, has to be compensated to the nomiee (s) of the deceased subject. The preceding subsections of the Rule explain the circumstances which is considered as a "direct nexus" to an immediate cause to the injury/death, consequences of non-payment of compensation, etc.

Insertion of Rule 122 DAC in the Drugs and Cosmetics Rule, 1945 (called as The Drugs and Cosmetics (Second Amendment) Rules, 2013.[3]

Rule 122 DAC specifies the prerequisites required for a clinical trial to be considered as adequate so as to grant permission by the Licensing Authority to be conducted on any human body. Further the rule lays down the power of the Licensing Authority to impose any additional conditions to be fulfilled in case of grant of permission in respect of any specific clinical trial, as it is deem fit.

Insertion of Rule 122 DD in the Drugs and Cosmetics Rule, 1945 (called as The Drugs and Cosmetics (Third Amendment) Rules, 2013.[4]

Rule 122 DD deals with mandatory registration of the Ethics Committee and specifies that no Ethics Committee shall review and accord its approval to a clinical trial protocol without prior registration with the Licensing Authority as defined in clause (b) of rule 21 and describes the procedure of such registration to be made by filling an application to be

1. *http://www.livemint.com/Politics/D0gBgwCn3huK72S06p8K5H/The-dark-underbelly-of-Indias-clinical-trials-business.html*
2. *Vide Notification of the Government of India, Ministry of Health and Family Welfare (Department of Health) number G.S.R 53(E) dated 30th January 2013 in the Gazette of India*
3. *Vide Notification of the Government of India, Ministry of Health and Family Welfare (Department of Health) number G.S.R 63(E) dated 1st February 2013 in the Gazette of India*
4. *Vide Notification of the Government of India, Ministry of Health and Family Welfare (Department of Health) number G.S.R 72(E) dated 8th February 2013 in the Gazette of India*

made to the Licensing Authority in accordance with the requirements as specified in the Appendix VIII of Schedule Y of the Rule and the procedure thereof.

CONCLUSION

As India is approaching towards globalization in the recent developments in the Pharmaceutical sector occurring worldwide, India portrays to be a prospective hub for many big foreign Pharmaceutical Companies for drug innovation, based on its comparatively low cost and skill base, so as to exploit this opportunity for the betterment of the country. However, all these while India was failing to implement a rigid and stricter vigilance mechanism on the Pharmaceutical Companies who conduct such clinical trial at the cost of the lives of some vulnerable and poor individuals who are not even aware that in our Country there is existence of "right" to lead a safe and healthy life. To conclude, with the insertion of the rules has brought light of hope to many of those vulnerable ones and it is expected that the concept of Good Clinical Practices (GCP) will be a reality and not just on papers. ◆◆◆

NEWSBYTE

Applicability of Service Tax on service provided by way of erection of pandal or shamiana

CBEC has vide circular No.168/3/2013- ST dated 15th April, 2013 has clarified the issue of applicability of service tax on service provided by way of errection of Pandal or shamiana.

As per the said circular,

1. It was observed that "Service" defined in section 65B (44) of the Finance Act, 1994, includes a 'declared service'. Activity by way of erection of pandal or shamiana is a declared service, under section 66E 8(f). The process of erection of Pandal or shamiana is a reasonably specialized job and is carried out by the supplier with the help of his own labour. In addition to the erection of pandal or shamiana the service is generally coupled with other services like supply of crockery, furniture, sound system, lighting arrangements, etc.

2. Many representations were received, wherein doubts were raised that such erection of Pandal or shamiana amounts to "transfer of right to use goods" and hence a deemed sale. However, in the said circular, it has been stated that, for a transaction to be regarded as "transfer of right to use goods", the transfer has to be coupled with possession .

3. Case laws have also been referred in the said circular to clear the issue,

a. Andhra Pradesh High Court in the case of Rashtriya Ispat Nigam Ltd. Vs. CTO [1990 77 STC 182] held that since the effective control and possession was with the supplier, there is no transfer of right to use. This decision of the Andhra Pradesh High Court was upheld by the Supreme Court subsequently [2002] 126 STC 0114.

b. In the matter of Harbans Lal vs. State of Haryana – [1993] 088 STC 0357 [Punjab and Haryana High Court], a view was taken that if pandal, is given to the customers for use only after having been erected, then it is not transfer of right to use goods.

c. In the case of BSNL Vs. UOI [2006] 3 STT 245 Hon'ble Supreme Court held that to constitute the transaction for the transfer of the right to use the goods, the transaction must have the following attributes:-

- There must be goods available for delivery;
- There must be a consensus ad idem as to the identity of the goods;
- The transferee should have a legal right to use the goods and, consequently, all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;
- For the period during which the transferee has such legal right, it has to be the exclusion of the transferor: this is the necessary concomitant or the plain language of the statute, viz., a "transfer of the right to use" and not merely a license to use the goods:
- Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others.

4. Applying the ratio of above judgments and the test formulated by Hon'ble Supreme Court, the activity of providing pandal and shamiana along with erection thereof and other incidental activities do not amount to transfer of right to use goods. It is a service of preparation of a place to hold a function or event. Effective possession and control over the pandal or shamiana remains with the service provider, even after the erection is complete and the specially made–up space for temporary use handed over to the customer.

5. Accordingly services provided by way of erection of pandal or shamiana would attract the levy of service tax.

Foreign Direct Investment (FDI) in India - Issue of equity shares under the FDI scheme allowed under the Government route

Reserve Bank of India vide RBI/2012-13/502 A.P. (DIR Series) Circular No. 104 dated May 17, 2013 has reviewed

1. vide Notification Notice No. 59(RE-2010)/2009-2014 in the Gazette of India Extraordinary Part-I, Section –I, Ministry of Commerce and Industry (Department of Commerce)dated 30th June, 2011

the policy issued vide A.P. (DIR Series) Circular No. 74 dated June 20, 2011 read with A.P. (DIR Series) Circular No. 55 dated December 9, 2011 wherein it was allowed to issue equity shares/ preference shares under the Government route by conversion of import of capital goods, etc. subject to terms and conditions.

Earlier, the condition Para 3(II)(c) states that "The payments should be made directly by the foreign investor to the company. Payments made through third parties citing the absence of a bank account or similar such reasons will not be eligible for issuance of shares towards FDI". On review, the stated condition has been modified. Accordingly, "The payments should be made by the foreign investor to the company directly or through the bank account opened by the foreign investor as provided under FEMA Regulations"

- **Government defers the date of effect for implementation of Bar-coding on Primary level packaging on export consignment of Pharmaceuticals to July 2014**

A barcode helps in tracking and tracing of origin of drugs, which in turn helps in minimizing the chances of genuine drugs being considered spurious, sub-standard or counterfeit. India exports over $ 10 billion worth of drugs annually. Indian government is hoping to raise the figure more in next coming years. Industry experts say the only way Indian pharma firms can tap the market is by ensuring quality and barcoding will help ensure that.

In order to reach the objective, the GOI in 2011 prescribed a proper and systematic procedure for tracing and tracking of export consignments of primary level packaging of pharmaceutical products and published vide a gazette notification that every exporter of such pharmaceutical products will have to follow a trace and track system and incorporate certain features/particulars using barcode technology as per GS 1 global standards as follows:-

- Incorporation of 2D (GS1 Data matrix) barcodes on medicines at strip/vial/bottle, etc. encoding unique product identification code (GTIN) and
- Unique Serial Number of the Primary pack.

Earlier the requirement of affixing barcodes on Primary Level packaging was to take effect from 01.07.2013 vide the same notification. However, now this date has been deferred to 01.07.2014 vide vide Notification Notice No. 54(RE-2012)/2009-2014 in the Gazette of India, Ministry of Commerce and Industry (Department of Commerce) dated 05th April, 2013

- **Letter sent by National Pharmaceutical Pricing Authority to Pharmaceutical companies for submission of data required for fixing ceiling prices of drug as proposed in the National Pharmaceutical Pricing Policy 2012**

Positive sign of progress has been seen in the steps taken by National Pharmaceutical Pricing Authority to execute of the National Pharmaceutical Pricing Policy 2012 which aims that the prices of drugs under National List of Essential Medicines (NLEM) are to be fixed by the Government, primarily based on (a) the prices at stockiest level and (b) the market share of specific formulations with the prime objective that essential medicines should become affordable to all and should reach out to every needy ones in India.

In regards to determine and fix the ceiling price of NLEM medicines, the policy suggests the formula of Simple Average Price of all the brands who are having market share(on the basis of Moving Annual Turnover) more than and equal to 1% of the total market turnover of that medicine.

Hence, in furtherance, NPPA vide notification F. No. 20(3)/2013 Div-I(MIS)/ NPPA dated 10th March, 2013 requested the Associations of Pharmaceuticals Companies as per list to submit relevant information relating to production, Moving Annual Turnover value (MAT value), prices at stockiest level as on 31.05.2012 to be provided as per an prescribed format which is enclosed with the same notification. The Companies were asked to submit the information by 20th March, 2013 positively in order to carry out process of price fixation under NPPP-2012 in time at earliest.

- **CDSCO has come up with guidelines for issue of "Written Confirmation" Certificate required for export of API to European Union countries.**

2. Available at :- http://www.nppaindia.nic.in/order/nlem/letterassoc-5-3-13.html, last visited 16th april, 2013

EU is aiming at implementation of 'Directive on Falsified Medicines' to be effective from 2nd July this year with the objective of preventing falsified medicinal products from entering EU from other countries, The directives required all non-EU countries ,in order to export (Active pharmaceutical ingredients) APIs meant for medicinal products for human use in EU, to hold a "Written Confirmation" certificate for each such API unit to be issued by the enforcement authorities of that countries confirming compliance with GMP standards or rules 'equivalent to the rules applied in the EU', such as WHO GMP, 'International Conference for Harmonization' Q7 (ICH Q7), etc.

In this regards, Ministry of Health and Family Welfare, Government of India, have nominated "Central Drugs Standard Control Organisation (CDSCO) as the competent Authority for the purpose of issue of "WC" certification. CDSCO have already come up with the guidelines for issue of "Written confirmation" certificate duly approved by the Ministry of Health and Family Welfare and published it vide notification 7-5/2013/ DCGI/Misc(EU) dated 10th April 2013. The guidelines explicitly describes the preface, the purpose of the certification, documents required to be submitted for the application for the grant for the certificate, procedure of inspection by the. ◆◆◆

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