

# NEWSLETTER

January, 2012

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Dear Reader,

We wish all our readers a happy and prosperous new year 2012. On the arrival of this year, we bring you the 1<sup>st</sup> Issue (2012) of our Newsletter.

The monthly newsletter is essentially dedicated to make our readers updated on the significant changes/ occurrences in the different sectors of Indian legal and regulatory system. This newsletter includes various updates on RBI, FEMA, FDI, Anti-corruption Laws, M&A, etc.. We hope to serve you through this newsletter and trust our endeavor to fortify our bonds together...

Thanks & Regards

OPK Team

## CORPORATE & TRANSACTIONAL

### Acceptance of Forwarder's Cargo Receipts

The RBI advised the Authorized Dealers to A.P. (DIR Series) Circular No. 27 dated March 2, 2001, in terms of which they may accept Forwarder's Cargo Receipts (FCR) issued by IATA approved agents, in lieu of bill of lading, for negotiation / collection of shipping documents, in respect of export transactions backed by letters of credit, only if the relative letter of credit specifically provides for negotiation of this document in lieu of bill of lading and also if the relative sale contract with the overseas buyer provides that FCR may be accepted in lieu of bill of lading as a shipping document. It has now been decided that authorized dealers may accept FCR issued by IATA approved agents, in lieu of bill of lading, for negotiation/ collection of shipping documents, in respect of export transactions backed by letters of credit, if the relative letter of credit specifically provides for negotiation of this document in lieu of bill of lading even if the relative sale contract with the overseas buyer does not provide for acceptance of FCR as a shipping document, in lieu of bill of lading.



## ECB by IFC

- ◆ IFCs are permitted to avail of ECBs, including the outstanding ECBs, up to 50 per cent of their owned funds under the automatic route.
- ◆ ECBs by IFCs above 50 per cent of their owned funds are being considered under the approval route. permitted end-use should be for on-lending to the infrastructure sector.
- ◆ IFCs should also hedge their currency risk in full.



## Diamond Dollar Accounts

The RBI has delegated powers to AD Category-I banks to open and maintain Diamond Dollar Accounts (DDAs) by eligible firms and companies subject to certain terms and conditions. It has now been decided that AD Category - I banks should submit a statement giving the data on the DDA balances maintained by them on a fortnightly basis within seven days of close of the fortnight.

## External Commercial Borrowings by Infrastructure Finance Companies

The RBI advised the Authorized Dealer Category-I (AD Category-I) banks that the Non-Banking Finance Companies (NBFCs) categorized as Infrastructure Finance Companies (IFCs) by the Reserve Bank and complying with the norms prescribed in the DNBS Circular are permitted to avail of ECBs, including the outstanding ECBs, up to 50 per cent of their owned funds under the automatic route. ECBs by IFCs above 50 per cent of their owned funds are being considered under the approval route. The permitted end-use should be for on-lending to the infrastructure sector, as defined under the extant ECB policy. IFCs should also hedge their currency risk in full. It has been decided that the designated AD Category - I banks should certify the leverage ratio (i.e. outside liabilities/owned funds) of IFCs desirous of availing ECBs under the approval route while forwarding such proposals to the Reserve Bank of India. All other aspects of the ECB policy, such as eligible borrower, recognized lender, maximum permissible limit under the automatic route, average maturity, all-in-cost, end-use, prepayment, refinancing of existing ECB and reporting arrangements shall remain unchanged.

## Compounding of Contravention under FEMA, 1999

The master circular deals with the compounding of contraventions under Foreign Exchange Management Act (FEMA), 1999 which is a voluntary process by which an applicant can seek compounding of an admitted contravention of any provision of FEMA, 1999. Foreign Exchange (Compounding Proceedings) Rules, 2000 have been framed empowering the Reserve Bank to compound contraventions under FEMA, 1999. To facilitate the operational convenience it has been decided to delegate the Powers to the Regional Officers of the RBI to compound the Contravention of FEMA involving:

- ◆ 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.

An application for compounding of a contravention under FEMA, 1999 may be submitted to the Compounding Authority on being advised of a contravention under FEMA, 1999, either through a memorandum or *suo moto* on being made or on becoming aware of the contravention. On receipt of the application for compounding, the proceedings would be concluded and order issued by the Compounding Authority within 180 days from the date of the receipt of the application for compounding.



## Memorandum of Instructions Governing Money Changing Activities



The master circular explains the guidelines for licensing and approval for authorized Money Changers, the grant of Authorization for Additional branches, guidelines for appointment of Franchisees, and how the renewal of licenses of existing Full Fledged Money Changer's (FFMC) be done. The request for issuance of FFMC license

would be considered by the Regional Office concerned of the Reserve Bank on the basis of the clearance by an Empowered Committee, set up for the purpose. Reserve Bank's decision in the matter of granting approval or otherwise will be final and binding. Under the Scheme, the Reserve Bank permits AD Category - I Banks, ADs Category - II and FFMCs to enter into franchisee agreements at their option for the purpose of carrying on Restricted Money Changing business i.e. conversion of foreign currency notes, coins or travellers' cheques into Indian Rupees. A franchisee can be any entity which has a place of business and a minimum Net Owned Funds of Rs.10 lakh. Franchisees can undertake only restricted money changing business. They need to have a franchisee agreement.

- ◆ The master circular explains the guidelines for licensing and approval for authorized Money Changers, the grant of Authorization for Additional branches, guidelines for appointment of Franchisees
- ◆ Also it explains how the renewal of licenses of existing FFMCs be done.
- ◆ The request for issuance of FFMC license would be considered by the Regional Office concerned of the Reserve Bank on the basis of the clearance by an Empowered Committee.

## External Commercial Borrowings (ECB) and Trade Credits

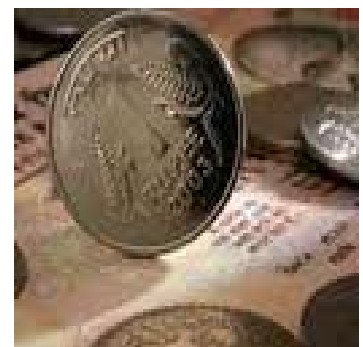
Indian companies are allowed to access funds from abroad in the following methods:

- ◆ ECB refer to commercial loans in the form of bank loans, buyers' credit, suppliers' credit, securitized instruments availed of from non-resident lenders with a minimum average maturity of 3 years.
- ◆ Foreign Currency Convertible Bonds (FCCBs) mean a bond issued by an Indian company expressed in foreign currency, and the principal and interest in respect of which is payable in foreign currency.
- ◆ Preference shares
- ◆ Foreign Currency Exchangeable Bond (FCEB) means a bond expressed in foreign currency, the principal and interest in respect of which is pay-

able in foreign currency.

- ◆ ECB can be accessed under two routes, viz
  - Automatic Route
  - Approval Route
- ◆ ECB for investment in real sector, industrial sector, infrastructure sector in India.

The master circular deals with the procedure of external commercial borrowing via two routes viz. Automatic Route and Approval Route, and the guidelines governing it. The master circular also governs of trade credits extended for imports directly by the overseas supplier, bank and financial institution.



## CCI seeks changes in Competition Act to deal with all M&A's in pharmaceuticals and other sectors

Anti-trust regulator Competition Commission of India (CCI) is seeking changes in the Competition Act, so that it can scrutinize mergers and acquisitions in pharmaceuticals and other sectors below the threshold turnover limit prescribed in the existing law. As per the current provisions of the Competition Act, CCI can only scrutinize M&A proposals where the combined threshold of the acquirer and acquiree is Rs 4,500 crore or more in terms of turnover and Rs 1,500 crore or more in terms of assets. A Planning Commission expert group has recommended that all

mergers and acquisitions (M&As) in the pharmaceutical industry should be cleared by competition watchdog CCI to ensure that such deals do not result in monopolies and increase in drug prices. However, the Finance Ministry is opposed to the idea and does not want to roll back the policy of 100 per cent FDI through an automatic route. The Industry Ministry is also for retention of 100 per cent FDI but wants all the deals to be scrutinized by the FIPB. The recent buyouts of the Indian firms by multi-national firms included takeovers of market leader Ranbaxy Laboratories by Daiichi Sankyo of Japan, Shanta Biotech by Sanofi Aventis of France, Piramal Health Care by Abbot Laboratories of the US. Also, Matrix Lab and Orchid Chemicals were bought over by Mylan Inc and Hospira of the US, respectively. Dabur Pharma was acquired by Fresenius Kabi of Singapore.

## FDI in Single Brand Product Retail Trading

Foreign Direct Investment (FDI), in retail trade, is prohibited except in single brand product retail trading, in which FDI, up to 51% was permitted. The Government of India has reviewed the extant policy on FDI and decided that FDI, up to 100%, under the government approval route, would be permitted in Single-Brand Product Retail Trading, subject to specified condi-

tions. The above decision will take immediate effect. The amended provisions will be incorporated in the next Circular on Consolidated FDI Policy to be issued on 31<sup>st</sup> March, 2012.



## FDI in Pharmaceuticals Sector

Foreign Direct Investment (FDI), up to 100%, under the automatic route, is permitted in the pharmaceuticals sector. The Government of India has reviewed

the extant policy on FDI and decided as under:

- ◆ FDI, up to 100%, under the automatic route, would continue to be permitted for greenfield investments in the pharmaceuticals sector.
- ◆ FDI, up to 100%, would be permitted for brownfield investments (i.e. investments in existing companies), in the pharmaceuticals sector, under the Government approval route.

## Significant changes in the fourth edition of the consolidated policy

The consolidated FDI policy document is a single reference point for investors and regulators. The significant changes introduced in this edition of the Circular are:

- ◆ Exemption of construction-development activities in the education sector and in old-age homes, from the general conditionality in the construction-development sector.
- ◆ Inclusion of 'apiculture', under controlled conditions, under the agricultural activities permitted for FDI.
- ◆ Inclusion of 'basic and applied R&D on bio-technology pharmaceutical sciences/life sciences', as an 'industrial activity', under industrial parks.
- ◆ Notification of the revised limit of 26% for foreign invest-

ment in Terrestrial Broadcasting/ FM radio.

- ◆ Liberalization of conversion of imported capital goods/machinery and pre-operative/pre-incorporation expenses to equity instruments.
- ◆ Introduction of provisions on 'pledging of shares' and opening of non-interest bearing escrow accounts, subject to specified conditions.

### FDI in Single Brand Product Retail

- ◆ FDI in retail trade, is prohibited except in single brand product retail trading, in which FDI, up to 51% was permitted.
- ◆ The Government of India has reviewed the extant policy on FDI and decided that FDI, up to 100%, under the government approval route, would be permitted in Single-Brand Product Retail Trading.
- ◆ The amended provisions will be incorporated in the next Circular on Consolidated FDI Policy on 31<sup>st</sup> March, 2012.

## SEBI Board Meetings

### 3<sup>rd</sup> January, 2012

On 3<sup>rd</sup> January, 2012 the SEBI Board met and decided the following:

- ◆ Manner of increasing minimum public shareholding to comply with Securities Contracts Regulation (Rules), 1957
- ◆ Institutional Placement Programme (IPP)
- ◆ Offer for sale of shares through stock exchanges.
- ◆ Amendment to SEBI (Buyback of Securities) Regulations, 1998.
- ◆ Procedure for acceptance of shares in buyback through tender offer.
- ◆ "Record date" in lieu of specified date
- ◆ Review of requirement of issuing Public Notice and Public

### 28<sup>th</sup> January, 2012

On 28<sup>th</sup> January, 2012 the SEBI Board met in New Delhi and decided the following:

- ◆ Reservation to Holders of Convertible Debt Securities in Rights/Bonus Issues
- ◆ Waiver of Certain Requirements Relating to Preferential Allotment to Insurance Companies and Mutual Funds
- ◆ Amendment to SEBI (Mutual Fund) Regulations, 1996
  - Amendment relating to Advertisement Code
  - Amendment relating to Investment Valuation Norms
- ◆ Amendment to SEBI (Portfolio Managers) Regulations, 1993

## Matters relating to Exchange Traded Derivatives

A derivative contract shall have a value of not less than Rs.2 Lakhs at the time of its introduction in the market. The mini derivative contract on Index (Sensex and Nifty) shall have a minimum contract size of Rs.1 lakh at the time of its introduction in the

market. The index futures contract shall have a maximum maturity of 12 months. The Exchange may consider introducing derivative contracts on an index, if weightage of constituent stocks of the index, which are individually eligible for derivatives trading, is at least 80%. However, no single ineligible stock in the index shall have a weightage of more than 5% in the index. The index on which futures and options contracts are permitted shall be required to comply with the eligibility criteria on a continuous basis. The Exchange shall check whether the index continues to meet the aforesaid eligibility criteria on a monthly basis.



## M&A's in the Kitchen World

More merger & acquisitions (M&As) are taking place among kitchen appliances majors in order to tap the fast growing market. According to experts, changing lifestyle at Indian houses bring more attention to kitchens causing MNCs eyeing strong foothold through M&As or partnerships. In one of the significant deals, French home appliance maker Groupe SEB had acquired 55 per cent in Maharaja Whiteline, the Delhi-based electrical appliance maker last month. In January 2011, global major- Philips had strengthened its Indian presence through buying out Maya Appliances that sells its products under the Preethi brand. Though deal size is not disclosed, sources disclosed that the deal was clinched at Rs 400-450 crore. Last month, Kreon Financial Services Ltd, a Non Banking Finance Company (NBFC) based in Chennai, acquired controlling stake in Indo-Italian joint venture firm Aran KitchenWorld India Pvt. Ltd. Aran Kitchen World is a joint venture between Italian modular kitchen firm Aran

World and Chennai-based Bohra Kitchens of Bohra Group, with 49 per cent and 51 per cent stake holdings respectively. Fisher & Paykel Appliances, a New Zealand high-end kitchen appliances brand, entered the Indian market, by joining hands with Shivam Industrial Corporation as its retail distributor. Similarly, the US-based \$2.6-billion consumer durables firm Westinghouse Electric Corporation entered Indian by launching its kitchen appliances in last November.



## EXTERNAL AFFAIRS

### India- Pakistan: Exchange of the list of nuclear installations and facilities

India and Pakistan on 1<sup>st</sup> January, 2012 exchanged, through diplomatic channels simultaneously at New Delhi and Islamabad, the list of nuclear installations and facilities covered under the 'Agreement on the Prohibition of Attack against Nuclear Installations between India and Pakistan'. The Agreement, which was signed on 31<sup>st</sup> December, 1988 and entered into force on 27<sup>th</sup> January, 1991, provides, inter alia, that the two countries inform each other of nuclear installations and facilities to be covered under the Agreement on the first of January of every calendar year. This is the twenty first consecutive exchange of such lists between the two countries, the first one having taken place on 1<sup>st</sup> January, 1992.

### India-Saudi Arabia Joint Commission on Technical and Economic Co-operation

The 9<sup>th</sup> Meeting of the India-Saudi Arabia Joint Commission on Technical and Economic Cooperation (JCM) was held in New Delhi on 4<sup>th</sup> - 5<sup>th</sup> January, 2012. Shri Pranab Mukherjee, Hon'ble Finance Minister and H. E. Dr. Tawfiq bin Fowzan Al-Rabiah, Minister of Commerce and Industry of the Kingdom of Saudi Arabia co-chaired the JCM. The 9<sup>th</sup> Meeting of the JCM took stock of the progress made since the "Riyadh Declaration 2010" signed during the visit of Hon'ble Prime Minister to Riyadh. The discussions of the JCM were held in three bilateral Sub Committees dealing with (i) economic and commercial, (ii) Education and Science & technology and (iii) Consular and community affairs. Agreed Minutes of the 9<sup>th</sup> JCM which provide the contours of future action plans for mutually beneficial bilateral cooperation were signed by the Heads of delegations at the end of the JCM.

## ANTI-CORRUPTION LAWS



### International Anti Corruption Day

9<sup>th</sup> of December is observed every year as the International Anti Corruption Day all over the world. A panel discussion organized in the office of UNDP, New Delhi this year had an eye catching slogan "Act against Corruption Today". A large group of young boys and girls staged a short street play on the lawns. The Hindi street play evoked strong feelings in the minds of the on-lookers. It portrayed the agony of the common man impacted by Corruption, in day to day dealings and also depicted the organized racketeering that had surfaced in recent times, showing the mind-boggling impact of Corruption on the economy of the country.

### Preventive Vigilance Initiative

The campaign of Preventive Vigilance was launched in early 2011 and continued for 8 months. Major features of the initiative are:-

- ◆ Regional level interactive sessions.
- ◆ Participation of terminal and regional level officers.
- ◆ Adhoc contract and extensions - measures to award regular contracts.
- ◆ Inter- departmental issues affecting quality of contract management discussed :- (Engineering, commercial & operations, accounts & finance).
- ◆ Participative vigilance- Checklist for vigilance scrutiny is finalized.
- ◆ Shortcomings/deficiencies of previous inspections of contracts (H&T, security, Survey etc.) and case studies on penalties imposed, etc. are discussed.
- ◆ Best practice of one terminal in each region is discussed for improvement in other places.
- ◆ Publications for dissemination of vigilance findings for learning of others.
- ◆ Creating awareness about transparent and employee friendly initiative of Online Vigilance Clearance, launched by Vigilance Commissioners.

## Cheque Truncation System

The Cheque Truncation system (CTS) was started by RBI on 01.07.2009 as a pilot project in Delhi. There has been a sudden spurt in fraud under the CTS, where by the fraudster tenders fake/fabricated/stolen and altered cheques. The presenting Banks trans-

mit the electronic/truncated image of such cheques. The paying Banks then pass the cheques on the basis of such image. The Chief Vigilance Officer of Punjab National Bank taking cognizance of the increasing menace of fraud taking place under, 'Cheque Truncation System' orga-

nized a meeting of Senior Officers of leading Banks in Delhi on 14<sup>th</sup> December, 2011. The conference, first of its kind was attended by 44 senior officers from 17 banks including SBI, OBC, BOI, UBI, UCO, Andhra, Canara, Syndicate, BOB, IOB, CBI, ICICI, HDFC, Axis bank. The Bankers discussed the ground rules for the Collecting Bank's Respon-

bility for, due diligence and also the Paying Bank's duties. A resolution was passed on the role of Banks to contain the menace. They also decided to take up with RBI to providing specific/separate guidelines on reporting of fraud under CTS and other related issues.

## ENVIRONMENTAL LAWS

### Revised Guidelines for 'Common Effluent Treatment Plants'

Under the Water (Prevention and Control of Pollution) Act, 1974, every industry has to provide adequate treatment of its effluents before disposal, irrespective of whether it is in stream, land, sewerage system of sea. The small scale industrial units (SSI), which are presently defined as units whose plant and machinery are valued at less than Rs. 5 Crore occupy an important place in the India economy. The SSIs are a major contributor to the total industrial pollution load of the country. However, only a small fraction of the effluent discharge from these units is estimated to be treated as on date. The Ministry of Environment & Forests (MoEF) has been implementing a centrally sponsored scheme for Common Effluent Treatment Plants (CETPs) since 1991. In the light of

the operational deficiencies in the earlier scheme, the development of pollution control technologies over the yr and also the financial constraints on the part of SSI proponents and the recommendations of SPCBs related thereto, the earlier guidelines for central assistance to CETPs were revised on 06.01.2012.



### Guidelines for 'Other Awareness Programmes'

**New guidelines for 'Other Awareness Programmes' have been issued. This Programme will fund proposals for promoting environmental awareness. Such proposals will be supported by the Ministry based on merits and on its endeavors to promote environmental awareness of different target groups.**

On 24<sup>th</sup> January, 2012 the MEAF issued guidelines for 'Other Awareness Programmes'. This Programme will fund proposals for promoting environmental awareness the scope of which is beyond that of other programmes of EEA T scheme. Such proposals will be supported by the Ministry based on merits and their conformity with the requirements of the Ministry in its endeavors to pro-

mote environmental awareness of different target groups. A suggestive list of 'Other Awareness Programmes' that will be financially supported by the Ministry include:

- ◆ Awareness cum action programs in and around the protected area, in wildlife corridors, biodiversity hotspots, rivers and wetlands.
- ◆ Awareness programs which focus on communities that are critical to conservation of forests/wildlife/environment.
- ◆ Activities like nature camps, Marathon/ walkathons / Yatras/ Quiz Competitions/ Green Haat.

## FROM OUR LAWYER'S DESK

### SC Verdict in Vodafone Matter

A three judge bench of the Supreme Court of India, which included Mr. Justice S. H. Kapadia, Chief Justice of India, delivered a landmark judgement in the famous Vodafone tax dispute.

The matter involved was in relation to the acquisition by Vodafone International Holdings BV ("VIH"), a company resident for tax purposes in the Netherlands, of the entire share capital of CGP Investments (Holdings) Ltd. ("CGP"), a company resident for tax purposes in the Cayman Islands ("CI") vide transaction dated 11.02.2007, whose stated aim, according to the Indian tax authorities, was acquisition of 67% controlling interest in Hutchison Essar Limited ("HEL"), being a company resident for tax purposes in India. VIH disputed the claim saying that VIH agreed to acquire companies which, in turn, controlled a 67% interest, but not controlling interest, in HEL. According to VIH, who had appealed against a Bombay High Court verdict favouring the tax authorities, CGP held indirectly, through other companies, 52% shareholding interest in HEL as well as Options to acquire a further 15% shareholding interest in HEL, subject to relaxation of FDI norms.

The tax authorities sought to tax the capital gains arising from the sale of the share capital of CGP on the basis that CGP, whilst not a tax resident in India, held the underlying Indian assets.

The Court examined various facets of the transaction and Indian tax laws to give its findings on facts of the matter which are summarized herein below.

#### Separate Entity Principle:

The Court underlined the fact that the holding and subsidiary entities are recognised in corporate as well as tax laws. The courts need to 'look

at' the entire ownership structure set up by a group as a single consolidated bargain and the revenue authorities are precluded to adopt the 'look at' approach in a dissected manner.

#### 'Look Through' Principle

Section 9 of the Income Tax Act, 1961 ("I-T Act") speaks about "Income deemed to accrue or arise in India." The section provides, inter alia, that for any entity (resident or non-resident) who also has business in geographical locations outside India, only that part of its income which can be reasonably attributed to have been earned in operations happening in India or through any activity having a business connection with India will be considered for calculation of income tax liability in India. The Court held that the provisions of Section 9 could not, by a process of interpretation, be extended to cover indirect transfers of capital assets/property situated in India. Interestingly, the Court made references to Direct Tax Code (DTC) Bill, 2009 and DTC Bill, 2010 to drive home the point that that indirect transfers are not covered by the existing Section 9(1)(i) of the present I-T Act .

#### Transfer by Extinguishment

The primary argument advanced on behalf of the Revenue was that the Share Purchase Agreement (SPA) in question evidenced a transfer of HTIL's property rights by their extinguishment.. That, HTIL had, under the SPA, directly extinguished its rights of control and management, which were property rights, over HEL and its subsidiaries and, consequent upon such extinguishment, there was a transfer of capital asset situated in India.

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**AN OVERVIEW:**

- Founded by Mr. O.P. Khaitan in 1990. Currently being managed by Mr. Gautam Khaitan as its Managing Partner;
- Well established, reputed, skilled and professionally managed full service Law Firm.
- Long associations with many International law firms in different jurisdictions.
- Quality of Legal Services - immaculate, consistent and impeccable.
- Our Members and Associates - Qualified from National and International Universities.
- Firm's Paramount Concept - "Clients' Satisfaction".
- Retained By - Several National and International Clients with Cross-Border Investment Objectives around the Globe.
- Key Focus - Cross-Border Mergers, Joint-ventures & Acquisition.
- 40 Lawyers + Paralegal and Support Staff of more than 40 people.
- The Office of the Firm-based in the prime location of South Delhi and is established in 4 floors totaling to 12,000 sq. fts. office space.
- The Firm is one of the exclusive members of several international networks of law-firms through which we ensure ready access to formal legal advice to our clients in other jurisdictions around the world.

*"What if we can help those things that really matter..."*

**SC Verdict in Vodafone Matter**

Situs of Shares

One of the arguments advanced by the Indian tax authorities was that since CGP was a mere holding company and since it could not conduct business in Cayman Islands, the *situs* of the CGP share existed where the "underlying assets are situated", that is to say, India. The Court rubbished the argument on the ground that the *situs* of the shares would be where the company is incorporated and where its shares can be transferred.

Share Sale vis-à-vis Asset Sale

The Court faulted the High Court for having adopted "nature and character of the transaction test" and applying dissecting approach by examining each individual asset and called for a holistic look at the transaction.

*"As a general rule, in a case where a transaction involves transfer of shares lock, stock and barrel, such a transaction cannot be broken up into separate individual components, assets or rights such as right to vote, right to participate in company meetings, management rights, controlling rights, control premium, brand licences and so on as shares constitute a bundle of rights."*

Scope and applicability of Sections 195 and 163 of IT Act

Section 195 casts an obligation on the payer to deduct tax at source ("TAS") from payments made to non-residents which payments are chargeable to tax. On the liability to deduct TAS, the Court held:

*"... The present case concerns the transaction of "outright sale" between two non-residents of a capital asset (share) outside India. Further, the said transaction was entered into on principal to principal basis. Therefore, no liability to deduct TAS arose.... Moreover, tax presence has to be viewed in the context of the transac-*

*tion that is subjected to tax and not with reference to an entirely unrelated matter. The investment made by Vodafone Group companies in Bharti did not make all entities of that Group subject to the Indian Income Tax Act, 1961 and the jurisdiction of the tax authorities.*

The Final Word

On the aforesaid analysis, the finally concluded as under:

*"Applying the look at test in order to ascertain the true nature and character of the transaction, we hold, that the Offshore Transaction herein is a bonafide structured FDI investment into India which fell outside India's territorial tax jurisdiction, hence not taxable. The said Offshore Transaction evidences participative investment and not a sham or tax avoidant preordained transaction. The said Offshore Transaction was between HTIL (a Cayman Islands company) and VIH (a company incorporated in Netherlands). The subject matter of the Transaction was the transfer of the CGP (a company incorporated in Cayman Islands). Consequently, the Indian Tax Authority had no territorial tax jurisdiction to tax the said Offshore Transaction."*

Therefore, the Supreme Court set aside the impugned judgment of the Bombay High Court dated 8.09.2010 in Writ Petition No. 1325 of 2010 and directed the Indian tax authorities to return the sum of INR 2,500 crores, which came to be deposited by the appellant in terms of Court's interim order earlier, with interest at the rate of 4% per annum within two months. The Court also directed the Registry to return the Bank Guarantee given by the appellant within four weeks.

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