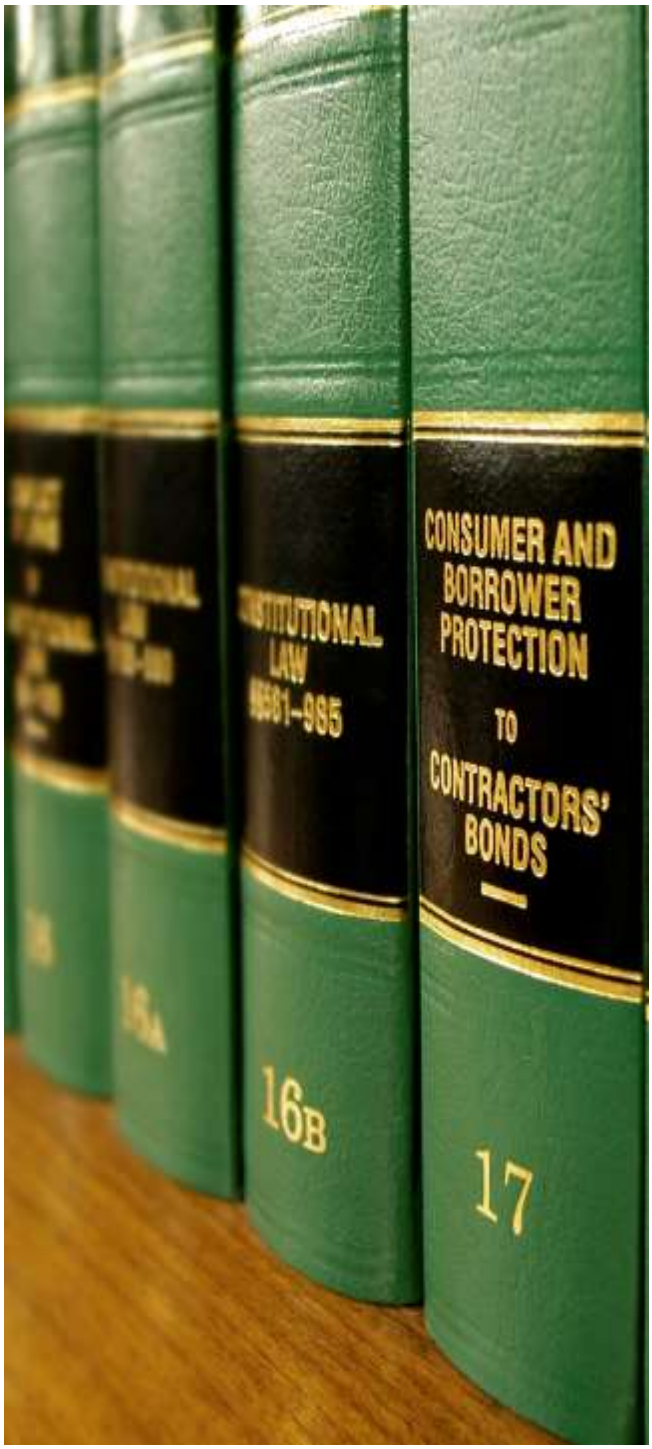
CONNEKT

February 2017

Contents

News & Views from IBA

Direct Tax
CASE LAWS



Case Law 1

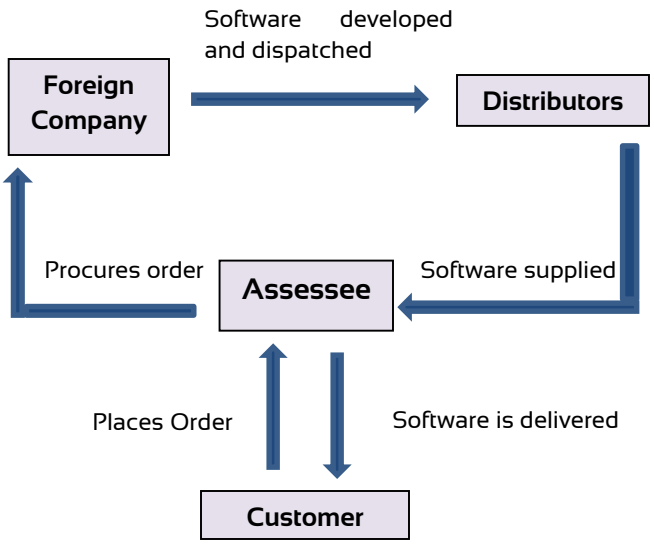
In the High Court of Madras

CIT vs Vinzas Solutions India (P.) Ltd

Where an outright purchase and sale of a product was made, such transaction does not fall under the definition of Royalty.

Facts

- The assessee was a dealer engaged in buying and selling computer software in the open market, where the software was purchased by distributors appointed by the owner of the software.



- The software development company had appointed the assessee as a Value Added Reseller, to purchase, market, distribute, sell and support the authorised products made available by the foreign development company.

- The Assessing Officer ("AO") disallowed the consideration for purchase on the ground that such consideration was in the nature of "royalty" and tax ought to have been deducted at source at the rate of 10% in accordance with the provisions of section 194J the Income Tax Act ("Act").

- The Commissioner of Income Tax ("CIT") rejected the assessee's appeal and invoked the provisions of 40(a)(ia) of the Act, thus disallowing the consideration for purchase.

Decision

- The Income Tax Appellate Tribunal ("ITAT"), reversed the order of the lower authorities and dismissed the Departmental Appeal answering the questions of law in favour of the assessee and against the Revenue.

- The ITAT considered the agreement entered between the assessee and the software development explaining that the assessee company procured orders from the end users and placed orders for supply of customized software meant only for that particular customer. The software could not be reused by another customer or by the assessee company. The right to use the software lied absolutely with the end use and the assessee company did not acquire any right in the software,

- The agreement also had a Non-Disclosure Agreement which stated that the assessee company acquired no rights or licenses in the software thus procured and that the software development company granted the assessee a **royalty- free** license to use a single copy of any software provided to the customer solely for the purpose of evaluation and feedback.

- The ITAT, thus explained the definition of Royalty as the payment made by a person who had exclusive right for allowing another to make use of that thing which could be either physical or intellectual property or thing. The exclusivity of the right for which royalty as paid should be with the grantor of that right. Mere passing of information concerning the design of a machine which is a tailor-made to meet the requirement of a buyer did not by itself amount to transfer of any right of exclusive user, so as to render the payment made therefor being regarded as royalty.

Case Law 2

High Court of Kerala

Commissioner of Income Tax (CIT) vs Settlement Commission (SC) (IT and WT)

Where CIT in his report had specifically stated that details of loan creditors were not furnished and hence creditworthiness of loans could not be verified, SC could not have straightaway refused to make any additions on basis of entries in Cash Flow Statement of alleged advances taken by assessee as loans if not proved have to be computed in total income and additions are to be made accordingly in a normal assessment

Facts of the Case

- The objection was with respect to the refusal of the SC to make any additions on the basis of the entries in the Cash Flow Statement [CFS]; of the alleged advances taken by the assessee.

- The assessee raised a preliminary objection that the CIT was not entitled to file a petition challenging the order of the SC, being a statutory authority under the Act which was based on the judgment of the Hon'ble Supreme Court reported in Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate and Another.

- The assessee contended that a specific authorisation from the Government of India 'GOI' was required, to file a written petition against such order of the SC, which only the GOI could have assailed and not the authorities constituted under the Act and that the CIT cannot challenge the order passed by the SC.

Decision of the Court

- The High Court relied on various judgements whereby Section 245D(1) was explained stating that the section is the stage at which the SC decides as to whether the application filed by an assessee is to be proceeded with and speaks of calling for the records from the CIT when the SC decides to proceed on the application filed by the assessee. It also confers power on the SC to direct the CIT to make available such further enquiry or investigation and furnish a report on the matters covered by the application. The section also empowers the SC to pass such order, as it thinks fit, on the matters covered by the application after examination of the records and the report of the CIT and also granting an opportunity of hearing to the applicant and to the CIT

- In the present case, the only contention raised was the non-consideration of the report and the provision relating to assessment in respect to the advances from others received from assessee, as seen from the CFS.

- In this context, the decision of the Hon'ble Supreme Court in CIT v. Om Prakash Mittal was considered whereby the assessee had claimed to have received by way of loans from seven persons, in cash.

After the order of the SC was passed, in which the contention of advances was accepted, an application was filed by the CIT pointing out certain misrepresentations. The Supreme Court had found that the Commission had missed the true scope and ambit of Section 245D(6) and if the CIT was able to establish that the order of the CIT was obtained on misrepresentation of facts, then it was open to the CIT to decide the issue and the same would not lead to any review of the earlier orders.

- In the present case, the Advance Ruling ("AR") pointed out that the details of these loans were available in the seized records and that the relevant Promissory Notes were also seized during the course of search. Further, rate of interest on these loans was also mentioned in the seized records and the confirmation letters from the creditors had also been filed but the CIT in his report stated that the details of the loan creditors were not furnished. Hence, the creditworthiness of the loan could not be verified.

- The manner in which additions had been refused to be made by the SC, was without any justified reasoning especially when the CIT had specifically, in his report, stated that the details of the creditors were not furnished and there was no manner in which the credit-worthiness of the said persons could be verified. The loans, if not proved had to be computed as part of the assessee's total income and additions made in a normal assessment, regulated the SC too.

- On the above reasoning, it was held that the SC had not properly considered the issue of addition or the genuineness of claim of advances from others. To that extent, SC's order was set aside and the matter was remanded to the SC for consideration of the loans for which the creditworthiness of the loan could not be verified.

Case Law 3

Software payments can't be held as royalty when reproduction rights are given for internal usage

Facts

- Qad Europe B.V. (hereinafter referred to as "The Assessee") was a company incorporated in Netherlands and was assessed as a Non Resident as per Indian Income Tax Laws. It was a 100% subsidiary of Qad Inc., USA (hereinafter referred to as 'Qad Inc.') which was engaged in the development and sale of Enterprise Resource Planning (ERP) software products.

- The assessee purchased software from Qad Inc. and resold the same to multinational companies outside USA and Latin American countries.

- The assessee entered into an agreement with M/s Hindustan Lever Ltd, an Indian Company (hereinafter referred to as "HLL") for the sale of licensed product, i.e. ERP software to HLL.

- Income arising from the said transaction was treated as business income by the assessee, and in absence of any PE in India, the same was not offered to tax in India.

- The assessee, non-resident filed its return declaring total taxable income (comprising of maintenance service charges) of Rs 3.3 Crores.

- Assessee's case was reopened by the AO u/s 147 on the ground that amount received by the assessee in the form of maintenance of software should be taxed as "Fee for Technical Services".

- In the Assessment Order, the Assessing Officer (AO) treated the transaction as 'Royalty' and disallowed the expense on account of no TDS deduction. CIT(A) upheld such disallowance.

- CIT(A) did not accept the submissions of the assessee and upheld the order of the AO.

- Aggrieved by the decision of CIT(A), the assessee filed an appeal before the ITAT on the ground that CIT (A) recharacterized the income received as royalty and accordingly disallowed the same.

Decision

- In the judgement, it was held that the agreement between assessee and HLL does not permit HLL to carry out any alteration or conversion of any nature, so as to fall within the definition of 'adaptation' as defined in Copyright Act, 1957. The right given to the customer for reproduction was only for the limited purpose so as to make it usable for all the offices of HLL in India and no right was given to HLL for commercial exploitation of the same.

It is also noted that the terms of the agreement do not allow or authorize HLL to do any of the acts covered by the definition of 'copyright'.

- Under such circumstances, the payment made by HLL cannot be construed as payment made towards 'use' of copyright particularly when the provisions of Indian Income Tax Act and DTAA are read together with the provisions of the Copyright Act, 1957.

- It was mentioned that DTAAs of few countries make a specific mention that payment made for software would be included within the definition of 'Royalty'. For instance, DTAA with Malaysia, Romania, Kazakhstan and Morocco. However, India - Netherlands DTAA does not include software while defining 'Royalty'.

- Accordingly, it was decided in favour of the assessee that payment received by the assessee on account of sale of software cannot be characterized as payment received on account of 'Royalty'.

Qad Europe B. V. v. Deputy Director of Income tax (International Taxation), [2017] 77 taxmann.com 267 (Mumbai Trib.)

<u>Case Law 4</u>

Supply of software embedded in telecom equipment to enable use of hardware will be sale of 'copyrighted good', not taxable as royalty

Facts

- ZTE Corporation, (hereinafter referred to as 'the assesse') was a tax resident of the Republic of China. It was engaged in the business of supplying telecom equipment i.e. mobile handsets.

- During the year under consideration, it was engaged in supply of telecom equipment to Indian telecom operators and also supplied mobile hand-sets to customers in India.

- No return of income was filed by the assessee considering that it had no Permanent Establishment (PE) in India in terms of relevant DTAA provisions.

- On a survey conducted under Section 133A at the assessee premises, several documents were seized and statements of its senior executives were recorded.

  On the basis of these documents and statements, the Assessing Officer (AO) formed the opinion that the assessee had a business connection in India and its business had been carried through its PE in India and further income had accrued to it during the relevant year from such business.

- A notice under Section 148 of the Income Tax Act ("the Act") was issued requiring the assessee to file its return of income, complying to which, assessee filed a NIL income return. Further in the notes to the "statement showing computation of income" the assessee stated that since it did not have PE in India, its revenues were not taxable as business profits.

Decision by Adjudicating Authority

AO after examining various statements, concluded that the assessee had fixed place PE, installation PE, dependent agency PE in India and, therefore, the revenues from the supply of telecom equipment and mobile hand sets were to be taxed in India as business profits and computed profits attributable to the assessee's PE in India.

He further pointed out that the profits to the PE in India have to be computed separately in respect of hardware and software components of the telecom equipment and the mobile handsets.

Accordingly, AO estimated the operating profits at 7.5% as against the weighted average of net operating profit at 2.53% as per the global accounts.

The assessee contended before the AO that the software embedded in the telecom equipment or provided to the customers separately, or software supplied to the various customers in India should not be treated as royalty under the Income Tax Act, 1961 or the relevant DTAA.

To support this, assessee put before the AO, the following contentions –

- Software is sold in the same manner as telecom equipment,

- The software is an integral part of the telecom equipment, which facilitates running of the said equipment.

- The subject software has no independent value of its own.

- No copyrights in the software are transferred to the customers.

- No access to the "source codes" in the software is granted to the customer.
- Payment for software is not related to the productivity, use or number of subscribers.
- Customers do not have the right to commercially exploit the software.
- Software supply is in the nature of transfer of copyrighted article and not transfer of "a copyrighted right".

Decision by Appellate Authority

The CIT(A) confirming certain conclusions of the AO, gave partial relief to the assessee and concluded that 2.5% of total sales made by foreign company in India was to be attributed as business profits of PE (including the value of software) and directed AO to delete the interest levied under Section 234B.

In addition, it was confirmed that software embedded in telecom equipment mobile handsets would be taxed as business profit.

Aggrieved by the order of CIT(A), both revenue and assessee appealed to the ITAT.

ITAT made the following findings –

- Level of operations carried out by assessee through its PE in India are considerable enough to hold almost entire sales functions including marketing, banking and after sales service were carried out by PE in India.
- Further, the findings of ld. CIT(A) to tax the income from sale of software as business income and not royalty were upheld.
- However, mode of computation resorted by AO in estimating the operating profits attributed to PE in India was not accepted by the ITAT.

Decision by High Court

Basis the factual findings of the case, the High Court made the following observations –

The software supplied, enabled the use of the hardware sold. It was not disputed that without the software, hardware use was not possible.

Mere fact that separate invoicing was done for purchase and other transactions did not imply that it was royalty payment. In such cases, the nomenclature (of license or some other fee) is indeterminate of the true nature. The high court further did not accept the contention that the payments, if not royalty, amounted to payments for the use of machinery or equipment as such a submission was never advanced before any of the lower tax authorities.

In addition to this, the question of interest payments under section 234B, was also decided against the revenue by the High Court and relief was given to the assessee.

Commissioner of Income-tax, (IT-2) v. ZTE Corporation HIGH COURT OF DELHI, [2017] 77 taxmann.com 304 (Delhi)

Case Law 5

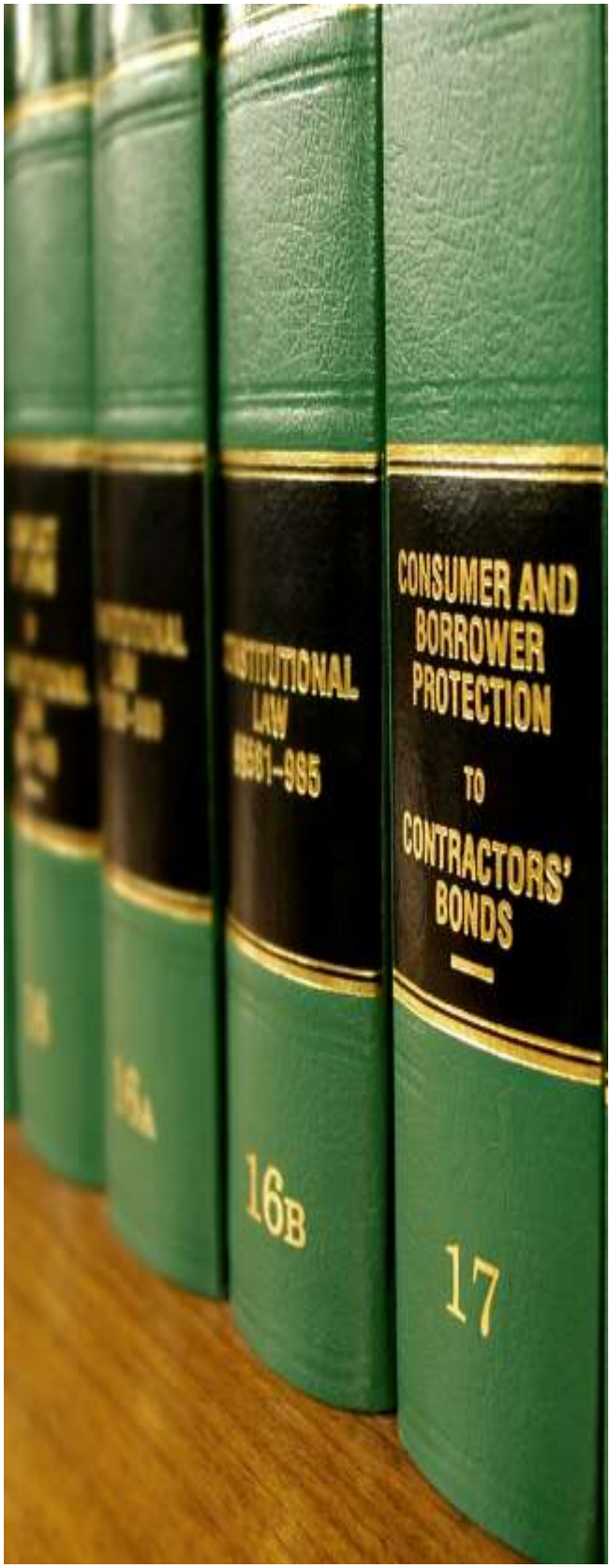
SLP dismissed against High Court's ruling that prescribed period of nine months within which DRP can issue directions, has to be computed from date of actual service of draft assessment order on assessee

Facts

- For relevant assessment year, assessee filed its return claiming exemption under section 10B. The Assessing Officer allowed assessee's claim for a lower amount. Thereupon, the draft assessment order was passed on 26-3-2014.
- The assessee's case was that the draft assessment order was served by hand on it only on 22-8-2014 and within 30 days of receipt of said order, objections were filed before DRP, Hyderabad.
- During the time assessee's objections were pending before the DRP, at Hyderabad, the Central Board of Direct Taxes issued instructions dated 1-1-2015, reconstituting the jurisdiction of DRP in terms of which DRP, Bengaluru, assumed jurisdiction over assessee.
- The DRP, Bengaluru, passed an order dated 22-6-2015 holding that the period of nine months fixed by section 144C(12) had expired by 31-12-2014 and that since it assumed jurisdiction only from 1-1-2015, they did not have jurisdiction to pass any orders on the objections of the assessee.
- Aggrieved by the order of DRP, the assessee filed a writ petition to the High Court.

Decision by High Court

The High Court analyzed provisions of Section 144C wherein under Sub-section (1) it is mandatory for the Assessing Officer to forward a draft



assessment order to the assessee and Sub-section (2) obliges the assessee to file objections within 30 days, before the DRP.

Sub-section (2) uses the phrase 'on receipt of the draft order'. Therefore, the word 'forward' appearing in sub-section (1) cannot have a meaning that is completely contrary to the words and expressions found in sub-section (2). Unless the word 'forward' is understood to mean actual service of the copy of the draft assessment order on the assessee, the word 'receipt' found in sub-section (2) would lose its meaning.
Therefore, the obligation of the Assessing Officer is to serve the draft assessment order on the assessee in a manner known to law. It is not enough for the Assessing Officer merely to pass a draft assessment order.

The period of 30 days available to the assessee to file objections, would start running only from the date on which the assessee receives the draft assessment order.

The writ petition was accordingly allowed, the order of the Dispute Resolution Panel, Bengaluru, dated 22-6-2015 is set aside and the matter was remanded back to DRP, Bengaluru for consideration on merits, in spite of the fact that the period for passing order by DRP expired by 31-5-2015 and assessee appeal to DRP was rejected vide order dated 22-6-2015.

Decision by Supreme Court

Against the High Court's order that in terms of section 144C(12), prescribed period of nine months within which DRP can issue directions, has to be computed from date of actual service of draft assessment order on assessee, a Special Leave Petition was filed by the revenue. The Supreme Court not finding any legal and valid ground for interference, dismissed the SLP.

Rain Cements Ltd. v. Deputy Commissioner of Income-tax, Circle-3(1), Hyderabad [2017] 77 taxmann.com 98 (SC)

NOTIFICATION

General Anti Avoidance Rules (GAAR)

The Government of India introduced GAAR as a measure to target all the business transaction or arrangement entered into solely for the purpose of tax avoidance. The GAAR provisions shall be effective from assessment year 2018-19 onwards, i.e. financial year 2017-18 onwards.

Kindly refer the following link for clarifications released by the CBDT in the form of FAQs, post introduction of GAAR provisions, in order to remove any ambiguity in the understanding of these provisions laid under the rules.

http://www.incometaxindia.gov.in/communications/circular/circular7_2017.pdf

Pradhan Mantri Garib Kalyan Deposit Scheme, 2016

Post the announcement of the demonetization, 'Pradhan Mantri Garib Kalyan Deposit Scheme, 2016 ('PMGKDS'), was introduced whereby an opportunity has been provided whereby undisclosed income in the form of cash or deposit can be declared.

Many Queries have been received from the stakeholders seeking further clarity on certain provisions of the Scheme. The Central Government has considered the queries and decided to clarify the same in the form of questions.

Kindly refer the following link for clarifications released by the CBDT in the form of FAQs.

http://www.incometaxindia.gov.in/communications/circular/circular02_2017.pdf

Indirect Tax

CASE LAWS

Credit of CVD paid on wireless phones imported by telecom operator & installed at customer's premises is allowed.

The assessee is engaged in providing telecom services. During 2004 and 2008 the assessee has imported some 'fixed wireless phones', afterwards these phones are installed at the premises of the subscriber. Assessee availed CENVAT Credit of Rs. 60.40 crore of CVD paid on import of said phones. The revenue denied the same on the ground that imported equipment has been taken out of the premises of assessee and installed at the premises of subscribers, hence depriving the assessee of ownership and consequently advantage to avail CENVAT Credit. Revenue said that the imported equipment installed at the premises of subscribers are subject to tax & interest & penalty under State VAT laws as these are considered to have been transferred to the subscriber. The assessee contended that subscriber's premises must be considered to be that of assessee due to nature of service and technology provided relying on the decision given in **Commissioner of Central Excise, Chennai Vs. PepsiCo Holdings Ltd. [2001(130) ELT 193 (Tri-Chennai)]** where it was held that placing of equipment outside the premises of manufacturer would not impede the availment of credit as long as the physical link with such premises is maintained. CESTAT stated that Adjudicating authority did not pay due attention to the statutory provision, that cenvat credit is predicated upon receiving the goods at the premises of service provider and there is no doubt that the 'fixed wireless phones' were not received at the premises of assessee otherwise it would have been impossible for the assessee to provide the phones to the subscribers to other premises. CESTAT stated that the rules are stringent in requiring the attention of capital goods at the factory of production but acknowledge that capital goods used for rendering service may have to be taken outside the premises. Thus, the flexibility in assigning a meaning to the expression 'premises' should have found a place hence set aside the impugned order and remanded the matter to adjudicating authority bearing in in mind applicability of various decision cited on behalf of the assessee.

Tata Teleservices (Maharashtra) Ltd Vs. Commissioner of Service Tax, Mumbai [TS-532-CESTAT-2016-ST]

Allows CENVAT Credit of tax paid on broadcasting fee reimbursed to advertising agency.

M/s. Zapak Digital Entertainment (or 'advertiser') was engaged in promoting its business by placing advertisement in various forms of media through advertising agency, who in turn, arranges a broadcaster for carrying the advertisement. The advertising agency allowed to charge their own fee as well as the reimbursement of fees paid to the broadcaster for carrying the advertisement. The broadcaster raises invoices on the advertising agency wherein they mentioned the name of advertiser as well as advertising agency name as agent in said invoice. The advertiser claims CENVAT Credit of the invoices issued by broadcaster and invoice issued by agency for Service Tax on commission amount. The assessing authority denied the CENVAT Credit of invoices of broadcaster contending that the tax paid by the advertising agency to the broadcaster is input services for the advertising agency and not to the advertiser and contended that the invoice was not raised on appellant but on advertising agency.
Tribunal held that advertisement agency is working on behalf of client and invoices raised by broadcaster clearly indicated that they had been issued in favour of advertiser along with name of advertising agency as an agent hence credit allowed and Such credit of invoices raised by broadcaster shall not be available to agency and rejecting the order issued by Commissioner of Service Tax.

M/s. Zapak Digital Entertainment Vs. Commissioner of Service Tax, Mumbai-II [TS-535-CESTAT-2016-ST]

'Swad' candy manufactured using prescribed formulae, taxable as ayurvedic medicine, not confectionery

The assessee is a dealer/distributor of drugs and ayurvedic medicine. The assessee has sold candy, namely "Swad" and paid tax at the rate 6% applicable to medicines. During the assessment, the assessing officer considered that "Swad" as a not an ayurvedic medicine but confectionery item on which tax rate of 10% is applicable and accordingly issued show cause notice as why such item not taxed at a rate 10%. Assessing officer applies the tax rate of 10% and levied differential tax on sale of Swad also demanded interest on such amount. The assessee earlier took the appeal to the Tax board where such appeal was upheld in favour of assessee. Afterwards the revenue took the challenge to the Hon'ble High Court where the revenue contended that if it is a medicine then it can only be sold in medical store, which is duly approved on the basis of a license whereas it is freely sold in other shops like betel shop and tea stalls. Revenue also said that it does not target sick people but it is used for change of taste or as a mouth freshener or just for the sake of fun and the ingredient used for preparation of Swad cannot said to be ayurvedic preparation hence the order of tax board is required to be reversed and that of the revenue be upheld. The assessee contended that it is a ayurvedic medicine because it is used by the people as a medicine who suffers from stomach ailment. The assessee also contended that they are making the Swad as per formula written on such Swad and it does not make any difference about whether it is freely available in betel shop or any other tea stall. HC holds that after noticing the ingredients "Swad" cannot be said to be a toffee because people takes the same in case of stomach disorder and since it is merely available in a tea stall or a betel shop does not change the character of an item. Hence the order passed by the Tax Board is proper and has rightly held that it is a ayurvedic medicine.

CTO Jaipur Vs. Khandelwal Drug Agencies [TS-575-HC-2016(RAJ)-VAT]

Refund of duty paid under protest on captively consumed 'clinker' dismissed as availability of alternate appeal remedy.

The assessee is engaged in manufacturing of cement and manufactured clinker which is captively consumed for the manufacture of cement by using input like gypsum. One of the unit of assessee was eligible to claim exemption from payment of excise duty. However, revenue denied that manufacture of clinker was eligible for exemption from payment of excise duty. Assessee paid the duty under protest on captively consumed clinker which was later eligible for refund due to SC ruling. Post application of refund claim, Revenue issued a deficiency memo since assessee failed to furnish all central excise invoices showing clearance of clinker for captive consumption. Assessee also submitted CA certificate to revenue simply stating the payment has been made under protest for excise duty.

Indirect Tax
CASE LAWS

Revenue rejected the claim and order the same to be transferred to the consumer welfare fund on the ground that the duty was passed by the asessee (since it was also reflected as an expense in P&L account). Revenue also contended that unless duty paid under protest was reflected as 'receivable' in the books of account, it would be presumed that burden of duty has been passed on to consumer. The assessee took the stand that conservative principles of accounting which are relied upon need not be applied universally. The amount was paid under protest is already confirmed by the auditors. Assesse also stated that cement prices are completely market determined and are independent of cost of manufacture. Any additional recovery or an attempt to pass on any burden would not be accepted by the market/consumer who may opt for any alternative in the market. HC observed that reliance of CA certificate was found to be inadequate and it is not a case entirely based on refund of amount deposited as pre-deposit but mix of such sums with the amount paid under protest and holds that mixed questions of fact and law are involved. Hence, judgement on the point of a writ cannot be maintainable as availability of alternate appeal remedy. Accordingly, HC dismisses assessee's writ petition on ground of availability of alternate appeal remedy with the appellate authorities.

ACC Limited Vs. Commissioner of Central Excise, Mumbai [TS-14-HC-2017(BOM)-EXC]

Circular

Due date extended for filling online return in Delhi VAT for 3rd quarter of F.Y 2016-17

Delhi government has extended due date of filling online/hard copy of return for the third quarter of the F.Y 2016-17 in Form DVAT-16, Dvat-17 and DVAT-48 to 13th February 2017.

[CIRCULAR No.21 of 2016-17 Dated:27/01/2017]

Legal & Regulatory

NOTIFICATION

RESERVE BANK OF INDIA

RBI prohibits Indian Party from making Direct Investment in Countries identified by Financial Action Task Force as Non Co-Operative Countries and Terrorities

(RBI/2016-17/216 A.P. (DIR Series) Circular No. 28 dated 25th January, 2017)

In order to align the existing regulations with the objectives of Financial Action Task Force (FATF), the Reserve Bank of India has prohibited Indian Parties from making direct investment in an overseas entity, (set up or acquired abroad directly as Joint Venture/ Wholly owned subsidiary or indirectly as step down subsidiary) located in the countries specified by FATF as "non-co-operative countries".

The Reserve Bank of India has taken this initiative to combat money laundering and the financing of terrorism and proliferation.

All AD Category -I Banks are required to inform to their constituents and customers regarding the prohibition.

https://rbidocs.rbi.org.in/rdocs/notification/PDFs/216NT250120174EB6D150A19B488A82E8222676E25D38.PDF

THE MINISTRY OF CORPORATE AFFAIRS

The Companies(Incorporation) 5th Amendment Rules, 2016

(MCA Notification dated 29th December, 2016)

The Ministry of Corporate Affairs vide its notification dated December 29, 2016 has notified Companies (Incorporation) Fifth Amendment Rules, 2016 which has come into force with effect from January 1, 2017, wherein Form INC-2 (Incorporation of OPC) and INC-7 (Incorporation of Companies) have been substituted with Form INC-32 (SPICe). The application for incorporation of Section 8 companies shall also be made in Form INC-32 (SPICe) along with Form INC-13 (Memorandum of Association) and Form INC- 31 (Articles of Association) only.

Form INC-32 (SPICe) shall be filed for application for allotment of DIN up to 3 directors, reservation of name, incorporation of a company, appointment of Directors of the proposed OPC, private company, public company and Section 8 company in which there can be maximum 2 resubmissions of the form in case of any discrepancy. The proposed name of the Company can be applied in Form INC-1 as well before filing INC-32 by proposing one name only and the applicant shall mention the SRN of Form INC-1.

http://www.mca.gov.in/Ministry/pdf/5th_Amendment_Rules_29122016.pdf

Application for Incorporation to include the Application for PAN and TAN

The Ministry of Corporate Affairs, in a further step towards ease of doing business in the Country, has made it convenient for the Companies to apply for PAN and TAN (to be allotted by Income Tax Department) for all the fresh incorporation applications through (SPICe) itself with effect from January 30, 2017.

Forms 49A (Application of PAN) and 49B (Application of TAN) shall be auto generated and get pre-filled after the submission of SPICe. The applicants are required to download the forms 49A and 49B and affix the DSC of the director who has signed in Form INC-32 and then both the signed forms are required to be uploaded on MCA portal as linked forms.

Legal & Regulatory

NOTIFICATION

The processing of Incorporation shall be processed only after the Forms 49A and 49B are uploaded and confirmation of payment by Ministry of Corporate Affairs has done.

PAN shall be printed in the Certification of Incorporation, and TAN will be separately communicated to the stakeholders by email.

Earlier to this notice, PAN & TAN were required to be applied post Incorporation.

The Companies (Incorporation) Amendment Rules, 2017

(MCA Notification dated 25th January, 2017)

The Ministry of Corporate affairs (MCA) vide its notification dated January 27, 2017 has notified Companies (Incorporation) Amendment Rules, 2017, effective from January 30, 2017, has made changes in Form INC-11 (Form of Certificate of Incorporation of a Company) which shall include the Permanent Account Number of the Company issued by Income-Tax Department.

Further, the Form INC-32 has been changed adding the details relating to applicability of registration under Employee State Insurance Corporation (ESIC), Employees Provident Fund and Miscellaneous Provisions Act 1952, and Importer Exporter code and particulars of proposed investment by the Company.

http://www.mca.gov.in/Ministry/pdf/IncorporatinRules_27012017.pdf

Thought LEADERSHIP

"To the winners, who won because they didn't give up."
Vijay Shekhar Sharma

Vijay passed his higher secondary when he was just 14 years old from Aligarh. His father was a highly principled, school teacher, who refused to earn the extra buck through tuitions. Vijay did not know how to read and write English he completed his school education completely in Hindi. He must start learning the language first and with the help of books, second hand magazines and his friends, he mastered the language in a way which few can.

The first-bencher in school slowly started gravitating towards the back benches, and in a short while, was so disheartened and disillusioned with his bad grades, mostly due to language constraints, that he completely stopped attending college.

But, he decided, to use the time he had from 'not attending college' by turning an entrepreneur. A believer in challenging the unknown, he made the internet his playground and Sameer Bhatia and Yahoo his inspirations.

He aspired to go to Stanford, because that was where Yahoo was built, but realizing his lack of financial resources and his challenges with the English language, he decided to emulate some of the genius at Stanford, by learning how to code all by himself.

He started building his own content management system with some of his college mates, which went onto being used by some of the biggest news publications including The Indian Express.

It was also during this time when he started his first job at an MNC. He quit after six months and built a company of his own with his friends. He finally passed his college examinations.

This would also become the darkest time in his life, when having his dreams of reaching the Silicon Valley shattered, he was also left bankrupt by his partners, with whom he had just begun a business and raised the first round of funding.

In 2005, he had raised a hefty amount of INR 8 lakhs through his venture of which he was conned off 40%. He was devastated. But Vijay was not a man to give up so easily. He lived at a hostel near Kashmiri Gate in Delhi, skipped meals and walked long distances to attend work or meetings in the southern part of the State.

Things took to a better turn when he began One97, the parent company of Paytm. They started experimenting with the three basics of internet-content, advertising and commerce.

But the big eureka moment came in 2011 when he first pitched the idea of entering the payment ecosystem in front of his board. The board was not convinced, as he was talking about betting the company's money on a non existent market.

So he put 1% of his equity, which was about $2 million around 2011, on the table and said, "This is for all of you, if I waste the money that we put on the site." He adds, "There is no fun in doing what others ask you to do, the real fun is in doing what people say you can't do".

And it is with this belief that the first avatar of Paytm, Pay Through Mobile, was born, going rapidly onto becoming the next big thing of the startup ecosystem in India. And, since then it was never looking back.

Column

Changes in definition of "Supply" under Old vis-à-vis New Model GST Law

By
Akshaya Khandooja

The concept of sale, manufacture, service for applicability of respective taxes prevalent under the current regime will be dissolved under GST and the applicability of GST will be triggered by the term **'supply'**. Thus, understanding of the term 'Supply' holds supreme importance.

The government on releasing the Model Goods and Services Tax Law in June 2016 ('**Old MGL**') coined the term 'Supply' whereby the government tried to encompass all the transactions under the GST net, leaving no room for any exemption (except for the exemptions specified under the GST law). However, the definition of supply had various anomalies/ ambiguities regarding which concerns were raised by multiple stakeholders (including industry, legal fraternity etc.).

The government appreciated the suggestions made by various Stakeholders and amended the definition of 'Supply' while introducing the Model Goods and Services Tax Law in November 2016 ('**New MGL**'). However, basic tenet of the definition which provided for an inclusive scope for all transactions such as sale, transfer, barter made for consideration in the course of furtherance of business remains same. We have highlighted the important changes as well as the implications of such changes in the definition of '**Supply**'.

To begin with, the definition of 'supply' provided under New MGL has 5 sub-sections and refers to 4 schedules. The nature of transactions covered under four schedules are as follows:

- Schedule I specifies list of transactions carried out even without consideration which would constitute 'supply'.
- Schedule II specifies transactions which shall be treated as supply of 'goods' or 'services' respectively.
- Schedule III provides for transactions that are neither 'supply of goods' nor 'supply of services'.
- Schedule IV provides for activities or transactions undertaken by Central government, a State government or any local authority which shall be treated neither as a 'supply' of goods nor a supply of services.

To understand the changes, it is imperative that we compare the definition of '***Supply***' in a tabulated form:

Column

Clause	Old Definition	New Definition	Comments/ Anomalies/ Ambiguities removed post introduction of new definition
1(a)	all forms of supply of goods and/or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business	all forms of supply of goods and/or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business	No change in the definition of New MGL. It is from this clause that all transactions under the sun will be exigible to GST unless specifically exempted
1(b)	importation of service, **whether or not** for a consideration and whether or not in the course or furtherance of business, and	importation of services, for a consideration whether or not in the course or furtherance of business, and	Import of services by non-assessee's (persons not required to obtain registration) on ***FOC basis*** were leviable to GST. However, under the new definition, any such service imported by non-assessee's ***without consideration*** is not leviable to GST. It is important to note that under the new definition there will be legal as well as compliance implications for certain transactions. One example is import of service by an individual for self-consumption against consideration. This transaction will attract GST and the service provider will be required to discharge GST and take registration himself or through an agent.
1(c)	a supply specified in **Schedule I**, made or agreed to be made without a consideration.	a supply specified in **Schedule I**, made or agreed to be made without a consideration.	There are considerable changes in the **'Schedule I'**, which have been discussed below.
2	**Schedule II**, in respect of matters mentioned therein, shall apply for determining what is, or is to be treated as a supply of goods or a supply of services.	**Schedule II**, in respect of matters mentioned therein, shall apply for determining what is, or is to be treated as a supply of goods or a supply of services.	**No change**

Column

2A	Where a person acting as an agent who, for an agreed commission or brokerage, either supplies or receives any goods and/or services on behalf of any principal, the transaction between such principal and agent shall be deemed to be a supply.	----------	This clause has been deleted from the definition, amended and then inserted in Schedule I. The new clause provides more clarity to such nature of transactions. This clause in Schedule I provides that transactions for supply of goods (the earlier definition provided for services as well) between Principal to Agent and vice-versa even without consideration would be exigible to GST
3	Subject to sub-section (2), the Central or a State Government may, upon recommendation of the Council, specify, by notification, the transactions that are to be treated as— (i) a supply of goods and not as a supply of services; or (ii) a supply of services and not as a supply of goods; or (iii) neither a supply of goods nor a supply of services.	----------	The said clause, has been retained and has been shifted from 3rd to 4th clause
3	----------	*Notwithstanding anything contained in sub-section (1), (a) activities or transactions specified in schedule III; or (b) activities or transactions undertaken by the Central Government,*	This clause has been newly inserted. This clause refers to Schedule III and Schedule IV. As mentioned above, Schedule III refers to transactions that are neither 'supply of goods' nor 'supply of services' and Schedule IV provides for activities or transactions undertaken by Central government, a State government or any local authority which shall be treated neither as a 'supply' of goods nor a supply of services.

Column

	-	a State Government or any local authority in which they are engaged as public authorities as specified in Schedule IV, shall be treated neither as a supply of goods nor a supply of services.	Further, the old MGL did not provide for Schedule III (as provided under New MGL), however, few transactions covered under Schedule III of New MGL, were provided in few sections of the Old MGL. As regards transactions enlisted under Schedule IV of Old MGL vis-à-vis under New MGL, there is no such difference.
4	Notwithstanding anything contained in sub-section (1), the supply of any branded service by an aggregator, as defined in section 43B, under a brand name or trade name owned by him shall be deemed to be a supply of the said service by the said aggregator	----------	The said clause has been deleted under the current law. This comes as a surprise for the industry and legal fraternity considering the fact that the term 'aggregator' was introduced in budget 2015 to tap service providers such as 'OLA', 'UBER' etc.. With this deletion various ambiguities such as whether a service provider will qualify as an aggregator or not will also come to rest. However, to keep such transactions under the GST ambit, such aggregators have now been covered under the definition of 'e-commerce operator'. Though the government has tried to simplify the law by bringing all such aggregators under the definition of e-commerce operator, the compliance burden on such service providers has been increased manifold.
5	----------	The tax liability on a composite or a mixed supply shall be determined in the following manner — (a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply;	Though OLD MGL covered such transactions under GST ambit by defining the term 'composite supply', however, no mechanism was provided to ascertain the rate of Tax leviable on such transactions. For reference, we have provided below the definition of 'composite supply' as provided under Old MGL: '(27) "composite supply" means a supply consisting of - (a) two or more goods; (b) two or more services; or (c) a combination of goods and services provided in the course or furtherance of business, whether or not the same can be segregated;'

Column

		The tax liability on a composite or a mixed supply shall be determined in the ***following manner —*** ***(a) a composite supply comprising two or more supplies, one of which is a principal*** ***supply, shall be treated as a supply of such principal supply;***	**The new MGL has bifurcated the abovementioned transactions by defining 'composite supply' and 'mixed supply'. The definitions of 'Composite supply' as well as 'Mixed supply' has been defined as follows:** ***"composite supply" means a supply made by a taxable person to a recipient comprising two or more supplies of goods or services, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;*** ***"mixed supply" means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply;'*** **In view of the above, one can determine the rate of tax of goods as applicable on the principal supply (as provided under composite supply) or on goods/ services so supplied.**

Having analysed the changes in the definition of 'supply' we now proceed to highlight the changes in the respective schedules.

Schedule I (of Old MGL) – Entries as provided in the earlier schedule covered following transactions:

- Sale/disposal of business assets
- Application of business assets to private or non-business use
- Services put to a private or non-business use
- Assets retained after de-registration
- Supply of goods/ services by a taxable person to another taxable or non-taxable person in the course or furtherance of business
- Supply of goods by a registered taxable supply to a job worker in terms of Section 43A not to be treated as supply of goods

The above listed transactions had various anomalies which are simply evident from reading such entries. We have highlighted few anomalies which are as follows:

- Transfer/ disposal of business assets against which input credit was not availed would also attract GST. Such anomaly has been removed under the New MGL.

- Business assets/ services put to private or non-business use were taxable, and the corresponding credit of using such business assets/ services was disallowed. The government has removed the levy on use of business assets for private or non-business use.

  However, Schedule I of New MGL includes supplies between related persons in course or furtherance of business. Due to this, non-monetary incentives by employer to employee may still be under the tax net, even if given for personal use. This is because such incentives can be construed to be in course or furtherance of business.

- Assets retained post de-registration by an assessee were exigible to GST. This clause would cover transactions wherein individual proprietor's would be exigible to GST. The government has removed this clause in the new MGL.

- Supply of goods/ services without consideration by a taxable person to another taxable/ non-taxable person in the course or furtherance of business was deemed supply. Through this transaction, all FOC supplies by taxable person to any person fell under the GST net. This provision faced enormous opposition from industry as it directly impacted their marketing and sales promotional operations. Hence, the government has removed this clause and accordingly, tax is not leviable on FOC supplies provided such supplies are made to related persons if in course or furtherance of business.

- The entry pertaining to supply of goods to job worker has been removed from the schedule and therefore such transaction would now be treated as supply. However, under the New MGL tax will not be levied on supply to job worker on fulfilment of certain conditions.

As regards Schedule II of Old MGL, confiscation and sale of assets of a taxable person (by banks, financial institutions etc.) for recovery of debt was considered as supply by such taxable person. The new law has removed this entry.

Schedule III which has been inserted only in the new MGL, broadly covers various transactions such as:

- Services by any employee to employer in course of or in relation to his employment

- Services by any Court or tribunal

- Functions performed by the Members of Parliament, State Legislature, Panchayats, Municipalities, and Other local authorities. Also duties performed by any person who holds any post under provisions of constitution

- Services by a foreign diplomatic mission

Services of funeral, burial etc.

No change has been made in entries in Schedule IV.

With the above analysis one can see that the definition of supply has evolved under the new MGL as certain ambiguities have been removed.

However, the drafting of the legislation still requires a lot of work in order to bring clarity and avoid any futile litigation on such provisions.

THOUGHTS WHICH INSPIRE US

"If you are not willing to risk the usual you will have to settle for the ordinary"

"Take up one idea. Make that one idea your life--think of it, dream of it, live on that idea. Let the brain, muscles, nerves, every part of your body, be full of that idea, and just leave every other idea alone. This is the way to success"

"Good things come to people who wait, but better things come to those who go out and get them"

"Opportunities don't happen, you create them"

JOKES

- One Smart Guy invented "WhatsApp", His wife added "Last Seen At" Feature to it.
- Patient: Doctor, I have a pain in my eye whenever I drink tea. Doctor Take the spoon out of the mug before you drink.
- A recent scientific study showed that out of 2,293,618,367 people, 94% are too lazy to actually read that number.
- Police officer talks to a driver: Your tail light is broken, your tires must be exchanged and your bumper hangs halfway down. That will be 90 dollars. Driver: Alright, go ahead. They want twice as much as that at the garage.

INTERESTING FACTS

- "I am" is the shortest complete sentence in English Language.
- Like fingerprints, everyone's tongue print is different
- Chewing gum while peeling onions will keep you from crying!
- Gorillas sleep as much as fourteen hours per day.

Birthdays of the Month

Angita Madan 4-February

Akshat Sharma 5-February

Megha Bidwatkar 20-February

IBA wishes You a Happy Birthday and a great year ahead!!

February 2017

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
			1	2	3	4
5	6 Excise Duty/ Service Tax payment by corporates and non-corporates	7 Tax deducted/ collected for the month of January	8	9	10 Filing of Excise Return Form ER-1 Form ER-2 Form ER-3 Form ER-8	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28 Revised Excise Return Form ER-1 Form ER-2 Form ER-3				

About Us

IBA constitute a young team of path breaking professionals, who believe in creating value through innovation and creativity so as to provide ultimate client satisfaction. Clients benefit from our fresh thinking, constructive challenge and practical understanding of the issues they face. We aim to alloy a perfect blend of professionalism with high standards of service, in our pursuit of excellence.

Ten years into conception, IBA continues to offer wholesome service experience to boost highly valued client relationships by combining the technical and industry expertise at par with well-placed firms together with a personal commitment to optimise client service.
Our service lines are headed by experts from the varied fields of Financial Outsourcing, Assurance, Risk, Taxation, Regulatory, Mergers and Acquisition who ensure timely delivery of value added services to our clients.

Stay Connected

- New Delhi
  S-217,Panchsheel Park
  New Delhi 110017

- Mumbai
  Suite 1108, Level 11 - 1102 Peninsula
  Business Park Tower B, S B Road
  Lower Parel
  Mumbai 400013

- Bangalore
  Golden Square Serviced Office
  #No 1101, 24th Main, JP Nagar
  1st Phase (above ICICI Bank)
  Bangalore-560078

Editorial Team

Somya Sharma

Sudhakar Jha

Sarthak Juneja

Meenakshi Verma

Queries/Feedback/Suggestions on this newsletter may be addressed to:

A joint initiative of International Business Advisors Private Limited (IBA) and Nayyar Maniar & Associates LLP (NMA LLP). IBA is a Company registered under the Companies Act, 1956 having its registered office at S-217, Ground Floor, Panchsheel Park, New Delhi – 110017, India. NMA LLP is a registered partnership firm.

For more information and past issues of ConneKt, kindly visit our website www.ibadvisors.co