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This issue contains:

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The Limitation of Benefits Clause in Double Taxation Avoidance Agreements

by

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Introduction

1. The need for Agreement for Double Tax Avoidance arises because of conflicting rules in two different countries regarding chargeability of income based on receipt and accrual, residential status, etc. As there is no clear definition of income and taxability thereof, which is accepted internationally, an income may become liable to tax in two countries. In such a case, the two countries have an Agreement for Double Tax Avoidance, in which case the possibilities are: (i) the income is taxed only in one country, (ii) the income is exempt in both countries, (iii) the income is taxed in both countries, but credit for tax paid in one country is given against tax payable in the other country. In India, the Central Government, acting under section 90 of the Income-tax Act, has been authorized to enter into double tax avoidance agreements. The aim of the article is to ascertain whether a 'Limitation of Benefits' clause is necessary in DTAA's to prevent revenue loss or in other terms whether the absence of a 'limitation of benefits' clause in a Double Taxation Avoidance Agreement would lead to revenue loss for contracting States?

Treaty Shopping-Pros and Cons of

2. Treaty shopping is defined as the practice of some investors of 'borrowing' a tax treaty by forming an entity (usually a corporation) in a country having a favourable tax treaty with the country of source, that is, the country where the investment is to be made and the income in question is to be earned.[1]

Successful treaty shopping generally consists of following two elements:

- a favourable income tax treaty with the country in which investment has to be done
- Attractive internal tax laws.[2]

Treaty-shopping is arguably, an instrument of international tax planning. What is about this kind of tax planning that makes it

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1 Rosenbloom, David (1994) Derivative Benefits: Emerging US Treaty Policy [1994] 22 Intertax 83. For a description of various treaty-shopping arrangements see OECD Conduit Companies Report in OECD, Committee on Fiscal Affairs of the OECD, International Tax Avoidance and Evasion, Four Related Studies, Double Taxation Conventions and the Use of Conduit Companies, Issues in International Taxation Series, No. 1 (OECD, Paris, 1987).

2 See Johnson, Antilles Treaty Termination Favored, But Period of Uncertainty in Bond Market Lies Ahead, 36 TAX NOTES 127, 129 (1987), See generally Belotsky, The Prevention of Tax Havens Via Income Tax Treaties, 17 CAL. W. INT'L L.J. 43, 97 (1987).

objectionable? A number of arguments have been advanced in the international tax community.[1]

2.1 *Arguments in favour of Treaty Shopping* - In *Union of India v. Azadi Bachao Andolan*,[2] the Supreme Court emphasized on that in developing countries treaty shopping was often regarded as a tax incentive to attract scarce foreign capital or technology.

Developing countries need foreign investments. The treaty shopping opportunities can be additional factors to attract them.[3] The developing countries allow treaty shopping to encourage capital and technology inflows, which developed countries are keen to provide to them. The loss of tax revenues could be insignificant compared to the other non-tax benefits to their economy.[4] Many of them do not appear to be too concerned, unless the revenue losses are significant compared to the other tax and non-tax benefits from the treaty, or the treaty shopping leads to other tax abuses. Treaty shopping may be a necessary evil, tolerated in a developing economy in the interest of long-term development.[5]

IT can be argued that when treaty-shopping increases economic activity, the overall economic gain might exceed source country's losses.

2.2 *Arguments against Treaty Shopping* - Treaty shopping is perceived as harmful by both, the OECD[6] and the UN[7]. The revenue loss due to treaty shopping is massive if the statistics are looked at.[8] India's tax treaty with Mauritius was reviewed because the tax department had estimated a revenue loss of over Rs. 5,000 crore caused by treaty shopping.[9]

2.2-1 *Treaty Shopping breaches the reciprocity of a tax treaty* - Firstly, it has been argued that treaty-shopping is an instance of tax avoidance and, as such, improper and contrary to the purposes of tax treaties.

IT has also been argued that treaty-shopping breaches the reciprocity of a treaty and alters the balance of concessions attained therein between the two contracting States.[10] Treaty shopping certainly leads to revenue loss

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[1] Avi-Yonah, Reuven S. and Panayi, Christiana Hji, Rethinking Treaty-Shopping Lessons For The European Union, Public Law And Legal Theory Working Paper Series, Working Paper No. 182, January, 2010, p.6.

[2] [2003] 132 Taxman 373 (SC).

[3] Eduardo Baistrocchi, "The Use and Interpretation of Tax Treaties in the Emerging World: Theory and Implications", [2008] 4 British Tax Review 352.

[4] Ibid, p. 281.

[5] Ibid.

[6] O.E.C.D., International Tax Avoidance and Evasion, Four Related Studies, Issues in International Taxation Series , Committee on Fiscal Affairs, at 90 (1987).

[7] U.N. Ad Hoc Group of Experts on International Co-operation in Tax Matters, 4th Meeting, Prevention of abuse of tax treaties , United Nations Secretariat, New York, 1987, at 96 (1987).

[8] Manju Menon, India asks Mauritius to review tax treaty, Times of India, Jan. 19, 2007.

[9] Ibid.

[10] See Income Tax Treaty Shopping: An Overview of Prevention Techniques, 5 Nw. J. Int'l L. & Bus. 626 1983-84.

as it violates the principle of reciprocity.[1] The State of residence receives disproportionate benefits[2] as compared to the source State due to treaty shopping. When a third country resident 'shops' into a treaty, then the treaty concessions are extended to a resident, whose State has not participated in this arrangement and may not reciprocate with corresponding benefits (*e.g.*, exchange of information). The usual quid *pro quo* of the treaty is therefore, compromised and the process subverted.[3]

2.2-2 *Treaty Shopping leads to revenue gains for third countries* - Another argument is based on the principle of economic allegiance. Pursuant to economic allegiance, a taxable base is attributable to the jurisdiction in which it is thought to owe its economic existence. Tax treaties are premised on the allocation of taxing rights according to this principle. Treaty concessions are of a personal nature and are not to be extended to third country residents. As a result of treaty-shopping, the third country gains revenue power, in the absence of any (substantial) claim to economic allegiance.[4]

Furthermore, it is often claimed that treaty-shopping creates a disincentive for countries to negotiate tax treaties. If third countries can get the benefits of reduced taxation for their residents without conferring reciprocal benefits to non-resident investors, then there is no need to enter into a tax treaty, especially if there are concerns that the treaty might be imbalanced.[5] This may put countries which comply with their duties of fiscal co-operation arising through tax treaties (e.g., exchange of information), at a competitive disadvantage internationally. Furthermore, lack of fiscal co-operation enhances opportunities for international tax evasion.[6]

2.2-3 *Treaty Shopping leads to revenue loss* - Finally, it is argued treaty-shopping is often linked with (undesired) revenue loss.[7] Tax treaties are based on a perceived level of balance of actual and potential income and capital flows between one country and the other. When the benefits of the given treaty are abused, the level and balance of these flows are distorted, with a resulting distortion in the share of the relevant

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1 Simon M. Haug., The United States Policy of Stringent Anti Treaty Shopping Provisions: A Comparative Analysis, Vol. 29, Vanderbilt Journal of Transnational Law, 1996, p. 217. ("The principle of reciprocity states that favours, benefits, or penalties that are granted by one State to the citizens or legal entities of another, should be returned in kind.").

2 Ibid. ("The fact that in 1981, 68 per cent of US source income flowed to only five US treaty countries, three of which were tax havens, indicates that many third country investors took advantage of an existing treaty network for their investments in US.").

3 Avi-Yonah, Reuven S. and Panayi, Christiana Hji, Rethinking Treaty-Shopping Lessons For The European Union, Public Law And Legal Theory Working Paper Series, Working Paper No. 182, January, 2010, p.8.

4 Ibid.

5 Conduit Companies Report, paragraph 7 (c); Becker & Würm (1988) 6.

6 Ibid.

7 Rosenbloom, David & Langbein, Stanley, United States Tax Treaty Policy: An Overview (1981) 19 Colum. J. Transnational Law 84.

chargeable income channelled to each State. Treaty-shopping expands the normal bilateral relationship of the treaty. A generous treaty with one trading partner becomes a treaty with the world. This de facto multilateralisation of the tax treaty is thought to entail a large and indeterminate cost to the source country.[1]

An analysis of Limitation of Benefits clause

3. An LOB provision is an anti-abuse provision that sets out which residents of the Contracting States are entitled to the treaty's benefits. The purpose of an LOB provision is to limit the ability of third country residents to obtain benefits under the said treaty. This type of use of the treaty, where third country residents establish companies in a Contracting State with the principal purpose to obtain the benefits of the treaty between the Contracting States, is commonly referred to as 'treaty shopping'.

> "Treaty shopping" is a graphic expression used to describe the act of a resident of a third country taking advantage of a fiscal treaty between two Contracting States. According to Lord McNair, "provided that any necessary implementation by Municipal law has been carried out, there is nothing to prevent the nationals of 'third States', in the absence of any expressed or implied provision to the contrary, from claiming the right or becoming subject to the obligation created by a treaty".[2]

A limitation of benefits clause usually includes the following: "substantial nexus" tests for a corporate entity to be eligible for tax treaty benefits; have its principal class of shares regularly traded on a recognized securities exchange;[3] satisfy more than fifty per cent ownership test and not more than fifty per cent base erosion test[4]; or be a "not for profit" entity.[5]

Better transparency and information exchange for tax purposes are keys to ensuring that taxpayers have no place to hide their income and assets and that they pay the right amount of tax in the right place.[6]

3.1 *'Limitation on Benefits' clause as a solution* - USA remains the most vocal opponent to such practices. The US Model, which defines

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[1] Rosenbloom, David (1994) Derivative Benefits: Emerging US Treaty Policy [1994] 22 Intertax 84.

[2] Lord McNair, THE LAW OF TREATIES, Oxford, at the Clarendan Press, 1961, p. 336.

[3] Draft U.S. Model Income Tax Treaty, June 16, 1981, reprinted in [Feb. 1993] 1 Tax Treaties (CCH) 211 ("[A] 'publicly traded' safe harbor provision is ordinarily included in a limitation of benefits provision. [A] corporation organized in Country A will be treated as a Country A corporation if its shares are publicly traded there."); Convention for the Avoidance of Double Taxation, U.S.-Russ., art. 20(2), reprinted in [Feb. 1993] 3 Tax Treaties (CCH) 1 10,660.41.

[4] W. P. Streng, Treaty Shopping: Tax Treaty "Limitation Of Benefits" Issues , 15 HOUS. J. INT'L L. 1, 32-33 (1992) ("[A] base erosion test ordinarily requires that no more than a specified percentage e.g., fifty per cent of the taxpayer company's gross income can flow-through the corporation to non-eligible persons.").

[5] Convention for the Avoidance of Double Taxation, art. 28(1)(c) & (f), Aug. 29, 1989, 5 U.S.T. 2769 ("[T]he German-U.S. Income Tax Treaty entered into force on August 21, 1991, effective retroactively to years beginning in 1990.").

[6] Information of the OECD website.

treaty-shopping non-exhaustively, contains an unequivocal statement in that "tax treaties should include provisions that specifically prevent misuse of treaties by residents of third countries".[1] The 'Limitation on Benefits' clause (LOB) is contained in Article 22 of the U.S. Model Tax Treaty. In general, the provision does not rely on a determination of purpose or intention, but instead sets forth a series of objective tests. A resident of a Contracting State that satisfies one of the tests will receive benefits regardless of the motivations in choosing its particular business structure. The LOB provision attempts to distinguish between treaty shopping arrangements (the target of the LOB clause) and *bona fide* transactions of enterprises operating internationally.

Article 22 contains anti-treaty-shopping provisions that are intended to prevent residents of third countries from benefiting from what is intended to be a reciprocal agreement between two countries. The structure of the Article is as follows:

> Paragraph 1 states the general rule that residents are entitled to benefits, otherwise accorded to residents only to the extent provided in the Article. Paragraph 2 lists a series of attributes of a resident of a Contracting State, the presence of any one of which will entitle that person to all the benefits of the Convention. Paragraph 3 provides that, regardless of whether a person qualifies for benefits under paragraph 2, benefits may be granted to that person with regard to certain income earned in the conduct of an active trade or business. Paragraph 4 provides that benefits also may be granted if the competent authority of the State from which benefits are claimed determines that it is appropriate to provide benefits in that case. Paragraph 5 defines certain terms used in the Article.

3.2 *Three Principal Test* - A limitation of benefits clause usually includes the following: "substantial nexus" tests for a corporate entity to be eligible for tax treaty benefits; have its principal class of shares regularly traded on a recognized securities exchange;[2] satisfy a more than fifty per cent ownership test and not more than fifty per cent base erosion test[3]; or be a "not for profit" entity.[4]

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1 See Technical Explanation on Article 22 of US Model.

2 Draft U.S. Model Income Tax Treaty, June 16, 1981, reprinted in [Feb. 1993] 1 Tax Treaties (CCH) 211 ("[A] 'publicly traded' safe harbor provision is ordinarily included in a limitation of benefits provision. [A] corporation organized in Country A will be treated as a Country A corporation if its shares are publicly traded there."); Convention for the Avoidance of Double Taxation, U.S.-Russ., art. 20(2), reprinted in [Feb. 1993] 3 Tax Treaties (CCH) 1 10,660.41.

3 W. P. Streng, Treaty Shopping: Tax Treaty "Limitation Of Benefits" Issues , 15 HOUS. J. INT'L L. 1, 32-33 (1992) ("[A] base erosion test ordinarily requires that no more than a specified percentage e.g., fifty per cent of the taxpayer company's gross income can flow-through the corporation to non-eligible persons.").

4 Convention for the Avoidance of Double Taxation, art. 28(1)(c) & (f), Aug. 29, 1989, 5 U.S.T. 2769 ("[T]he German-U.S. Income Tax Treaty entered into force on August 21, 1991, effective retroactively to years beginning in 1990.").

The LOB Clause uses following three principal tests to determine eligibility for treaty benefits:

(i) Public company test;

(ii) Ownership/Base-erosion test; and

(iii) Active Business Test/Economic Substance Doctrine

Note the tests are not concurrent tests. Only one test needs be satisfied.

3.2-1 *The public company test* - The public company test is based on the assumption that a publicly traded company has sufficient connection to the country in which its shares are listed. Where shares are not listed on a Stock Exchange of the country of residence, treaty benefits are not available, unless the company's primary place of management and control is located in the country of residence.[1]

The public company test applies to publicly traded companies and subsidiaries of publicly traded companies. Under this test a company must satisfy the following criteria:

(i) the principal class of its shares and any disproportionate class of shares are regularly traded on one or more recognized Stock Exchanges, and

(ii) the company's principal class of shares is primarily traded on one or more recognized Stock Exchanges located in the State of residence, or

(iii) the company's primary place of management and control are in State of residence.[2]

3.2-2 *The ownership and Base Erosion Test* - The ownership and base erosion test is a two-part test. Both prongs of the test must be satisfied for the resident to be entitled to treaty benefits under this test. The ownership/base erosion test attempts to ensure that if a State of residence company enjoys benefits as a resident of the State R, the ultimate beneficiaries of treaty relief are residents of the State R, and not residents of third States.

The ownership prong of the test requires that 50 per cent or more of each class of shares in the State of residence enterprise is owned, directly or indirectly, on at least half of the days of the taxable year of the State R enterprise by persons who are residents of State R and that are themselves entitled to treaty benefits under one of the tests for benefits eligibility. In the case of indirect owners, however, each of the intermediate owner must be a resident of State R.[3]

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1 Report of the OECD on Fiscal Affairs - "Double Taxation Conventions and the Use of Conduit Companies" (2005).

2 Avi-Yonah, Reuven S. and Panayi, Christiana Hji, Rethinking Treaty-Shopping Lessons For The European Union, Public Law And Legal Theory Working Paper Series, Working Paper No. 182, January, 2010, p.17.

3 Explanation of proposed protocol to the income tax treaty between the United States and Denmark, DIANE Publishing, 2007, p. 31.

The base erosion test ordinarily requires that no more than a specified percentage, *e.g.*, fifty per cent of the taxpayer company's gross income can flow through the corporation to non-eligible persons. The base erosion prong is not satisfied if 50 per cent or more of the gross income of a State R enterprise for the taxable year, as determined under the tax laws of State R, is paid or accrued to persons who are not residents of State R entitled to benefits under one of the tests for benefit eligibility, in the form of payments deductible for tax purposes in State R.[1]

3.2-3 *Economic Substance Doctrine* - Under the Economic Substance Doctrine, the Court may decline tax benefits arising from transactions that do not result into a meaningful change to the taxpayer's economic position other than purported reduction in federal income-tax.[2] In *Aiken Industries, Inc . v. Commissioner*[3], a US subsidiary borrowed funds from its parent company in Ecuador, and in order to be able to exempt the interest payments under the US-Honduras treaty, paid the interest to a subsidiary in Honduras. The US Tax Court disallowed treaty benefits in this back-to-back loan, because in the absence of a business purpose, the Honduran affiliate acted as a conduit for passing the interest payments to its parent in Ecuador.[4]

The court in *ACM Partnership v. Commissioner* [5] scrutinized the transaction under the economic substance test, which it described as containing separate, but interrelated inquiries:

> 'The inquiry into whether the taxpayer's transactions [have] sufficient economic substance to be respected for tax purposes turns on both the "objective economic substance of the transactions" and the "subjective business motivation" behind them. However, these distinct aspects of the economic sham inquiry do not constitute discrete prongs of a "rigid two-step analysis," but rather represent related factors both of which inform the analysis of whether the transaction had sufficient substance, apart from its tax consequences, to be respected for tax purposes.'[6]

The Court defined the objective test as asking "whether the transaction has any practical economic effects other than the creation of income-tax losses." [7] The subjective leg of the economic substance test looks to business purpose.

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1 Philip J. Warner, LUXEMBOURG IN INTERNATIONAL TAX PLANNING, IBFD, 2004, p. 496.
2 Joseph Bankman, "The Economic Substance Doctrine", Southern California Law Review, Vol. 74:5, 2000, p. 9.
3 56 T.C. 925, 1971 WL 2486 (1971).
4 Ibid.
5 157 F.3d 231 (3d Cir. 1998).
6 Ibid, at 247.
7 Ibid, at 248.

Switzerland

Switzerland Rules out Replacing VAT with Energy Levy

The Swiss Federal Council has rejected a popular initiative calling for value-added tax (VAT) in Switzerland to be replaced with a tax on energy.

While underlining its support for the overarching aim of the initiative, the Federal Council nevertheless warned against plans to abolish VAT in Switzerland. Highlighting the fact that VAT is the main source of income in the Confederation, the Federal Council pointed out that VAT is also an increasingly important source of financing for the country's social insurance regime. Emphasizing that VAT is considered to be an "efficient tax" internationally, the Federal Council maintained that the levy is also a good complement to the progressiveness of the Confederation's individual income tax system.

Furthermore, the Federal Council argued that in order to guarantee the public finances, in the event that VAT were to be abolished, the rate of the proposed energy tax would have to be "very high." Indeed, the rate would have to be raised beyond a level that could be justified by energy and climate policy, the Federal Council explained. In addition, the rate would have to be subsequently increased, as households and businesses in Switzerland consume less energy from non-renewable sources.

Concluding, the Federal Council insisted that plans to replace VAT with a tax on energy would merely serve to significantly increase the fiscal burden on companies. Given that VAT is largely neutral for external trade, a tax on energy would therefore penalize domestic companies compared to their foreign competitors, the Federal Council noted. Finally, the Federal Council said that an energy tax would adversely affect low-income households in particular, and made clear that companies and individuals would not have sufficient time to prepare for such a major tax reform.

In a message addressed to the Federal Chambers, the Federal Council therefore recommended to the people and the cantons in Switzerland that the initiative be rejected.

Put forward by the Green Liberal Party of Switzerland in December 2012, the initiative advocates the introduction of a tax on non-renewable energy in Switzerland, including oil, natural gas, coal, and uranium, to enable the Confederation to achieve its climate and energy policy objectives. To compensate for the additional tax burden, the party suggested abolishing VAT. The party aims to increase energy efficiency, promote renewable energy, and reduce carbon dioxide emissions.

Switzerland currently levies VAT at a headline rate of 8 percent, a reduced rate of 2.5 percent, and a special 3.5 percent rate for hoteliers. Although the Swiss Federal Council remains committed to maintaining its primary source of income, attempts to simplify and reform the current system have been blocked by lawmakers, including plans to unify the two reduced rates of VAT. – *Courtesy tax-news.com*

Ireland

No Change to Irish Pay and File Deadlines

Finance Minister Michael Noonan has decided not to introduce any changes to Ireland's pay and file regime for 2014.

Noonan had intended to bring the dates forward, in order to provide increased certainty around the annual tax take and forecasting process. He also hoped this would facilitate a permanent move in the Budget date to earlier in the year, after having delivered his 2014 Budget in October. His previous Budgets have, by contrast, been announced in December.

In 2012, the cumulative tax yield to the end of November stood at EUR33.8bn (USD45.4bn). This represented 92 percent of the full year outturn of EUR36.6bn. On the other hand, the cumulative yield to end-September was just EUR26.1bn, or 71.3 percent of the eventual outturn.

Noonan consulted on a range of options for new dates. It was proposed that the income tax pay and file date could be moved to either end-June or end-September. As a result, the capital gains tax (CGT) system would have required altering, as CGT returns are made as part of the income tax return.

According to a statement released by the Finance Department, Noonan has now decided to hold off on the plans for 2014. He will, nevertheless, pursue similar reforms of 2015.

The news has been welcomed by Chartered Accountants Ireland. Brian Keegan, Director of Taxation, said: "The disruption which would have been caused to Irish indigenous business in the SME sector by bringing forward tax payment deadlines would have been very serious. Chartered Accountants Ireland, along with the other professional accounting bodies had robustly argued against earlier tax payment dates, pointing out the cash flow implications for small businesses.

"The Minister's statement is also positive in that it proves that the consultation he announced in early October was serious in its intent, and its outcome has reflected the views of Irish business. This augurs well for the formation of future policy changes affecting taxpayers."

Keegan added that "Chartered Accountants Ireland will continue to consult with Government to ensure that any future changes to be made are kept to the minimum necessary, and with appropriate preparation and lead in times for the taxpayers involved." – *Courtesy tax-news.com*

Oman

Oman May Tax Remittances

The economic and financial committee of Oman's Shura Council has advised the government to tax the remittances sent by foreign workers to their home countries.

The tax, to be levied at two percent, is intended as a measure to ease growing pressure on the state budget.

The deputy head of the committee, Ali bin Abdullah al-Badi, insisted that the tax would not negatively impact Oman's economy or its citizens.

The proposed tax would affect about 1.5m expatriate workers, most of whom come from south and southeast Asia. It would also generate roughly OMR62m (USD161m) in annual tax income, based on the OMR3.1bn of outbound worker remittances recorded in 2012.

The tax would enable Oman to diversify its revenues beyond oil and would encourage more hiring of Omani citizens by making foreign workers more expensive.

In September it was revealed that the United Arab Emirates is considering a tax on remittances. – *Courtesy tax-news.com*

Move to curb under-invoicing

The Federal Board of Revenue is identifying several import items that are prone to under-invoicing in a move to assess their actual value for levying customs duty and allied taxes.

Wrong declarations and under-invoicing result in a significant loss of revenue.

The Board's exercise is driven by the dip in customs duty collection over the first four months of this fiscal year. However, checking under-invoicing will also help address complaints of manufacturers whose products turn uncompetitive in the domestic market because of cheaper, partially duty- and tax-evaded imports.

FBR Chairman Tariq Bajwa says that products at high risk of being under-invoiced are being identified. The Board, he said, has already given a presentation to Finance Minister Ishaq Dar for formal approval of the FBR's proposal.

The declaration of low value by importers for assessment of duty and taxes results in a huge revenue loss to the national exchequer. This not only helps importers save customs duty, but also 17 per cent sales tax that is slapped on the duty paid value, and the six per cent advance income tax that is paid on the sales tax-paid value of goods.

Under-invoicing is rampant because the customs department has yet to issue a ruling for bringing the maximum number of products under its ambit across the country. The ruling can bring uniformity for clearance of goods at all ports and minimise chances of tax evasion.

In the absence of such a ruling, it is at the discretion of customs officers to either accept the importer's declared value as it is, or to do the same of their own choice. In both cases, the involvement of customs officials in corruption cannot be ruled out.

This situation suggests that the FBR can bring the ruling on values of under-invoiced products. The ruling can be issued under section 20A of the Customs Act, but this would need the government's commitment to generate more revenue. The rulings will help the customs department create a reference book of values for all products.

While, for the customs department, the increase in the value of imports is a matter of raising revenue; for the industrialists, cheaper under-invoiced goods are equally a serious issue. These goods are crowding out domestically manufactured goods from the domestic market. This menace is believed to be one of the reasons for closure of local industries, which has left thousands workers jobless.

The importer disposes his stock at under-invoiced landed cost, but the real retail price of that item is much higher than the under-invoiced cost. This works out to a competitive advantage for the importer of a commodity, and to the detriment of the locally manufactured product.

Local auto manufacturers have raised this issue time and again, but no efforts have been made by the government to tackle it.

On an individual basis, some local manufacturers have approached the National Tariff Commission for blocking products dumped in the domestic market. During 2002- 2009, protection was provided to local manufacturers of only 23 products against cheaper imports.

In the last five years, no other case was finalised for tariff protection because of the cumbersome procedures and bureaucratic red tape.

However, some customs officials believe that increasing the value of imported products for duties and taxes may make these goods attractive for smuggling. The usual channel that has been used for dumping smuggled goods into the domestic market is the Afghan Transit Trade.

Much of the goods imported under the transit trade, either through Iranian or Pakistani ports, ultimately land in the Bara market of Peshawar.

Tackling under-invoicing does not appear to be a simple issue. There is a need to carefully study it and then come up with an approach to enforce the true valuation of imported goods. The FBR will have to fine tune its policy of value assessment while keeping in view the constant global price fluctuations, and also improve its governance accordingly.

And to fully implement its trade-defensive laws like anti-dumping and countervailing duties etc., and to provide a quick remedy to the domestic industry against cheap imports, the tariff commission needs to be restructured. – *Courtesy Dawn*

Customs proposes cut in forex cap for travellers

Customs department has proposed to the State Bank of Pakistan (SBP) to reduce foreign currency cap from US $10, 000 to $3000 for itinerants. “Yes, we have given a proposal to the central bank and Federal Board of Revenue (FBR) to revise foreign currency cap from US $10, 000 to US $3000," senior Customs official disclosed while talking at Customs House here on Monday.

The proposal aimed at averting flight of foreign currency besides deflecting currency depreciation, Collector Preventive Tariq Huda elaborated.

He said that foreign currency cap of US $10, 000 was creating draconian impact on country's economy, due to immense number of itinerants, who were around 5 million per annum.

Replying to a question, he said the proposal was tabled before SBP and FBR for consideration and hoped if this proposal was approved, it would be fruitful for economic revival and currency stability.

Customs has also recommended the authority to impose ban on youth, below 15, to bring foreign currency during foreign trips.

He said that we had also proposed the authority to restrict the limit of foreign currency cap to US $1000 for youth between f 15 to 18 years.

It appeared that government's imprudent policies had not only made the authorities unable to stop flight of foreign currency but also caused to provide rooms for money laundering.

In the same way, the Karachi Regional Tax Offices (RTOs) keep proposing the authority to remove section 111(4) of the Income Tax Ordinance, 2001 and make tax officials enable to monitor foreign remittances through banking channels. However, the authority kept mum over the proposal with the best reason known to them.

Presently, all black-income - either generated by extortion mafia, land grabbers, tax evaders - can easily be laundered through Hawala-Hundi as section 111(4) of the Income Tax Ordinance, 2001 provides immunity from probe to the recipients of foreign remittances through proper banking channels. – *Courtesy Business Recorder*

S.R.O. 968(I)/2013, Islamabad, the 6th November, 2013.– In exercise of the powers conferred by Section 40B read with clause (u) of subsection (4) of Section 20 of the Securities and Exchange Commission of Pakistan Act, 1997 (XLII of 1997), the Securities and Exchange Commission of Pakistan hereby gives the following directive to all registered life insurers under the Insurance Ordinance, 2000:

1. Whereas section 6(8) of the Insurance Ordinance 2000 (the Ordinance) describes the requirements to be submitted by a life Insurer intending to carry on life insurance business. The Commission is pleased to notify detailed product submission requirements after considering a holistic view of Section 6(8) and section 13 of the Ordinance, Rule 26(1)(a) of the Takaful Rules, 2012, the Guidelines for Bancassurance – 2010 and the Guidelines for Life Insurance and Family Takaful Illustrations – 2009 and Circular No. 6 of 2006 as amended by Circular No. 7 of 2011 on Maximum Management Expense Limits for Life Insurers.
2. **Application:** This Directive is applicable to all life insurers (including family takaful operators) offering individual life (including health) insurance products whether in conventional bundled non-linked form or as investment contracts (i.e. unit linked and universal life) through any distribution channel. This Directive is also applicable to group life (including health) insurance products.
3. **Submission Requirements:**

   A life insurer is required to submit the documents as per Annexure 1 on the following instances:

   (a) Introduction of new products or riders/supplementary benefits; and

   (b) Amendments in existing products or riders/ supplementary benefits
4. **Group Life Business:** A specific risk such as death due to any cause, critical illness, or hospitalization expense reimbursement etc. shall be considered to be a product for the purpose of this Directive. It is clarified here that offering of a particular risk to different corporate clients through the same master policy document shall not be considered a different product even a different marketing name is used.
5. **Allotment of Unique Product/Rider Registration Number:** After carrying out the due evaluation of the documents submitted, the Commission shall allot a unique product/rider registration number which shall be used in all future correspondence with the Commission. If a same product is offered through different distribution channels (or through different banks) with a different brand name, the unique product registration number shall be different for each brand name.

6. **Withdrawal of a product/Rider:** An insurer may withdraw an existing product/rider from the market after informing the Commission the reasons of withdrawal, within 14 days from the date of such withdrawal.
7. **Timeframe for Product Registration:** The Commission shall communicate to the insurer that the product has been registered or not, as the case may be, within 30 days of receipt of an application for product submission. However, if an insurer does not receive any query from the Commission within 30 days since the date of submission of the product, it shall be permissible for the insurer to market the product. If the Commission send notice to the applicant before the expiry of thirty days, the period of thirty days shall be extended unless the Commission explicitly communicates its clearance. If the application for product submission is not complete then, it shall not be treated as received until the insurer completes the application from all aspect.
8. **Post-Registration Implementation Certificate:** After getting the product registered with the Commission but before the commencement of selling the Product, a life Insurer is required to submit a post-registration implementation certificate that the Product has been implemented on the administrative systems of the insurer in accordance with the documents submitted to the Commission. Such a certificate shall be signed by the appointed actuary of the insurer.
9. **Effective Date:** This Directive shall be effective from **December 1, 2013.** All life insurers (including family takaful operators) are required to submit their products in accordance with this Directive.

Annexure I

Life Insurance Product Submission Requirements

<table>
<tr><th>Description</th><th>Conventional Products Non-Linked</th><th>Investment Products
(Unit Linked & Universal Life)</th></tr>
<tr><td rowspan="2">(A) Statement of Rates</td><td rowspan="2">(A1) Premium rates, basis, and methodology</td><td>(A2) Schedule of mortality (morbidity) rates, basis and methodology</td></tr>
<tr><td>(A3) Description of other charges in terms of:
(i) Type (i.e. Front-end/Black-end/Recurring); (ii) Basis for determination (iii) Scale/Rate; (iv) Frequency; (v) Basis for increase</td></tr>
<tr><td rowspan="6">(B) Statement of Advantages</td><td colspan="2">(B1) Description of built-in riders/supplementary benefits</td></tr>
<tr><td colspan="2">(B2) Description of optional riders/supplementary benefits attached with the product</td></tr>
<tr><td colspan="2">(B3) Description of death (or any other main) benefit design including any death benefit deferral period</td></tr>
<tr><td colspan="2">(B4) Description of surrender value</td></tr>
<tr><td colspan="2">(B5) Description of maturity benefits</td></tr>
<tr><td colspan="2">(B6) A sample illustration as per illustration Guidelines 2009</td></tr>
</table>

<table>
<tr><td rowspan="4"></td><td rowspan="3">(B7) Bonus distribution (including planned rates of reversionary & terminal bonuses)</td><td>(B8) Yearly schedule of proportion of premium allocated to policy holders' investment or unit account</td></tr>
<tr><td>(B9) Loyalty rewards/bonus allocation/maturity bonus and the accounting policy to recognize the resulting liability</td></tr>
<tr><td>(B10) Surplus distribution mechanism for Takaful products</td></tr>
<tr><td>(B11) Policy loan, interest rate and repayment</td><td>(B12) Description of partial withdrawal eligibility, limits, charges and any consequent impact on death benefit</td></tr>
<tr><td rowspan="16">(C) Statement of Terms and Conditions</td><td colspan="2">(C1) Statutory Fund to which the policies under the product shall be referable</td></tr>
<tr><td colspan="2">(C2) Life assured persons(s) (i.e. single life or joint life, or blanket cover of family etc.</td></tr>
<tr><td colspan="2">(C3) type of coverage (death due to any cause, critical illness etc.)</td></tr>
<tr><td colspan="2">(C4) The basis on which surrender value is determined</td></tr>
<tr><td colspan="2">(C5) Minimum and maximum age at entry, term, premium and maximum maturity age</td></tr>
<tr><td colspan="2">(C6) Automatic non-forfeiture options</td></tr>
<tr><td colspan="2">(C7) Settlement options for claim, surrender, maturity proceeds (e.g. annuity option)</td></tr>
<tr><td colspan="2">(C8) Distribution channels(s), remuneration structure, incentives, distribution agreement, sales process</td></tr>
<tr><td colspan="2">(C9) Minimum and maximum financial protection component</td></tr>
<tr><td colspan="2">(C10) Indexation of sum cover and/or premium, indexation basis (simple or compound) and rate;</td></tr>
<tr><td colspan="2">(C11) Any proposed deviation from standard underwriting approach and associated extra loading</td></tr>
<tr><td colspan="2">(C12) Reinsurance arrangement applicable to the product (name of the reinsurer, applicable reinsurance treaty, risk retention-cession structure, any special terms negotiated with the reinsurer etc.)</td></tr>
<tr><td colspan="2">(C13) Policy document to be attached</td></tr>
<tr><td rowspan="3">C(14) Long term investment policy of the relevant statutory fund</td><td>(C15) Investments to which the policy is linked (including a description of any investment guarantees and/or other guarantees and the associated accounting policy to recognize the resulting liability)</td></tr>
<tr><td>(C16) Frequency with which and basis by which the unit values are determined; and the values attributed to units at the time of purchase and sale.</td></tr>
<tr><td>(C17) the basis on which expenses attributed to the policy are determined (for example at aggregate statutory fund level)</td></tr>
<tr><td>(D) Statement of Appointed Actuary</td><td colspan="2">(D1) A statement by the appointed actuary that the terms and conditions of the life insurance contracts proposed to be entered into are sound and workable (including a statement that he product satisfies the maximum management expense limits as prescribed under Circular No. 6 of 2006 or any modification thereof.)</td></tr>
<tr><td>(E) Shariah Compliance Certificate</td><td colspan="2">(E1) Only for family takaful operator as per rule 26(1)(a) of the Takaful Rules, 2012);</td></tr>
</table>

Reference No: ID/PRDD/PW-II/LIPSR/2013/18126,

Islamabad, the 8th November, 2013

SECP CIRCULAR NO. 21/2013

Subject: **Live Insurance Product Submission Requirements.**

In exercise of the powers conferred by Section 40B read with clause (u) of subsection (4) of Section 20 of the Securities and Exchange Commission of Pakistan Act, 1997 (XLII of 1997), the Securities and Exchange Commission of Pakistan hereby gives the attached directive to life insurers through SRO No. 968(I) dated November 6, 2013 on the subject.

2 The aforementioned directive is placed at the following URL:

http://www.secp.gov.pk/circulars/pdf/Cir_2013/Directive-Life-Insurance-Product-Submission-Requirements.pdf

3 All life insurers and family takaful operators are required to submit a list of their currently active individual life and group life products, riders or supplementary benefits to the Commission to get the registration number with the following particulars:

(a) Brand name of the product

(b) Technical name of the product

(c) Type of the product (i.e. individual life or group life)

(d) The distribution channel (through which it is currently being sold)

4 The above mentioned list should be provided on or before December 1, 2013. All new products or amendments in existing products on or after December 1, 2013 shall be submitted to the Commission in accordance with the aforementioned directive.

2013 TRI 1904 (H.C. Guj.)

HIGH COURT OF GUJARAT AT AHMEDABAD

M.R. Shah and Sonia Gokani, JJ.

Dattani and Co.
v.
Income Tax Officer

FACTS/HELD

ITAT duty-bound to deal with all judgements cited during hearing of appeal

1. The assessee filed an appeal against an addition for alleged bogus purchases/sales which was dismissed by the Tribunal. The assessee filed an appeal before the High Court claiming that he had relied on the judgement in CIT vs. President Industries 258 ITR 654 in the verbal and written submissions and that the Tribunal had not considered it. HELD by the High Court remanding the case to the Tribunal for fresh consideration:

    Whenever any decision has been relied upon and/or cited by the assessee and/or any party, the authority/tribunal is bound to consider and/or deal with the same and opine whether in the facts and circumstances of the particular case, the same will be applicable or not. In the instant case, the Tribunal has failed to consider and/or deal with the aforesaid decision cited and relied upon by the assessee. Under the circumstances, all these appeals are required to be remanded to the Tribunal to consider the addition made by the AO towards alleged bogus purchases/sales and to take appropriate decision in accordance with law and on merits and after considering the decision of this Court in the case of CIT vs. President Industries 258 ITR 654.

Appeals allowed.

Tax Appeal No. 847 of 2013 with Tax Appeal No. 848 & 849 of 2013.

Decided on: 21st October, 2013.

Present at hearing: R.K. Patel, Advocate, for Appellant. Pranav G. Desai, Advocate, for Opponent.

JUDGMENT

Per M.R. Shah, J.–

1.00. As common question of law and facts arise in this group of Appeals, they are disposed of by this common order.

2.00. All these Tax Appeals have been preferred by the common appellant - assessee challenging the common impugned judgement and order passed by the Income Tax Appellate Tribunal, Rajkot Bench, Rajkot in ITA Nos.1249 to 1252 of 2010 with respect to Assessment Years 2002-03, 2004-05 and 2006-07.

2.01. It is required to be noted that in the respective appeals, the appellant proposed the following substantial questions of law:

TAX APPEAL No.847 of 2013:–

"1. Whether Tribunal is right in law and on facts in confirming addition of Rs.24,151/-, Rs.4,443/- & Rs.4,70,000/- towards alleged bogus purchases/sales in contravention of settled principles of law?

2. Whether on facts and in law, the Tribunal has substantially erred in not resorting to provision of section 255 for referring the matter to Full Bench/Special Bench and deciding the disputed issue of purchases & sales in conflict with earlier Tribunal's decision of the same Bench pressed into service by the appellant?

3. Whether on facts and in law, the Tribunal's and conclusion for confirming addition towards purchases and sales for the year under consideration is in ignorance of relevant material on record and taking aid of irrelevant factors not germane to subject matter of appeal with the result that the finding and conclusion of the Tribunal is "vitiated" on facts and in law?"

TAX APPEAL No.848 of 2013:–

"1. Whether Tribunal is right in law and on facts in confirming addition of Rs.3,42,311/- & Rs.1,42,908/- towards alleged bogus purchases/sales in contravention of settled principles of law?

2. Whether on facts and in law, the Tribunal has substantially erred in not resorting to provision of section 255 for referring the matter to Full Bench/Special Bench and deciding the disputed issue of purchases & sales in conflict with earlier Tribunal's decision of the same Bench pressed into service by the appellant?

3. Whether on facts and in law, the Tribunal's and conclusion for confirming addition towards purchases and sales for the year under consideration is in ignorance of relevant material on record and taking aid of irrelevant factors not germane to subject matter of appeal with the result that the finding and conclusion of the Tribunal is "vitiated" on facts and in law?"

TAX APPEAL No.849 of 2013:–

"1. Whether Tribunal is right in law and on facts in confirming addition of Rs.6,42,769/- & Rs.1,83,168/- towards alleged bogus purchases/sales in contravention of settled principles of law?

2. Whether on facts and in law, the Tribunal has substantially erred in not resorting to provision of section 255 for referring the matter to Full Bench/Special Bench and deciding the disputed issue of purchases & sales in conflict with earlier Tribunal's decision of the same Bench pressed into service by the appellant?

3. Whether on facts and in law, the Tribunal's and conclusion for confirming addition towards purchases and sales for the year under consideration is in ignorance of relevant material on record and taking aid of irrelevant factors not germane to subject matter of appeal with the result that the finding and conclusion of the Tribunal is "vitiated" on facts and in law?"

2.02. By order dtd. 1/10/2013 passed in the respective Tax Appeals, we dismissed all these Tax Appeals so far as proposed Question Nos.2 and 3 are concerned and issued notice to consider proposed Question No.1 and observed as under:

"Now, so far as the proposed substantial question of law i.e. question No.1 is concerned, Shri Patel, learned counsel appearing on behalf of the appellant assessee has heavily relied upon the decision of this court in the case of Commissioner of Income Tax vs. President Industries reported in 258 ITR 654, which seems to be not dealt with and/or considered by the learned Tribunal.

Hence, for the aforesaid, NOTICE returnable on 21st October 2013. Direct service is permitted."

2.03. Mr.R.K. Patel, learned advocate appearing on behalf of the appellant has vehemently submitted that with respect to addition made towards alleged bogus purchases/sales, the assessee heavily relied upon the decision of this Court in the case of *Commissioner of Income Tax vs. President Industries*, reported in 258 ITR 654. It is submitted that though the said decision was cited before the learned tribunal and even the same was so stated in the Written Submission before the learned tribunal, the tribunal has not considered and/or dealt with the same at all.

2.04. Mr.Pranav Desai, learned advocate appearing on behalf of the respondent – revenue has tried to support the common order of the tribunal impugned in the main Tax Appeal, however, he has fairly conceded that the learned tribunal has not considered and dealt with the decision in the case of Commissioner of Income Tax vs. President Industries reported in 258 ITR 654, relied upon by the assessee and even cited by the assessee in the written submission before the learned tribunal.

3.00. Considering the fact that the decision of this Court in the case of Commissioner of Income Tax vs. President Industries (supra), which was relied upon by the assessee, was cited and pointed out before the learned tribunal, the learned tribunal at least ought to have considered and dealt with the same. From the written submissions, it also appears that the aforesaid decision was cited before the learned tribunal. From the impugned Judgement and Order passed by the learned tribunal it appears that the learned tribunal has not considered and/or dealt with the aforesaid decision relied upon by the assessee at all.

4.00. Whenever any decision has been relied upon and/or cited by the assessee and/or any party, the authority/tribunal is bound to consider and/or deal with the same and opine whether in the facts and circumstances of the particular case, the same will be applicable or not. In the instant case, the tribunal has failed to consider and/or deal with the aforesaid decision cited and relied upon by the assessee. Under the circumstances,all these appeals are required to be remanded to the tribunal to consider the addition made by the Assessing Officer towards alleged bogus purchases/sales and to take appropriate decision in accordance with law and on merits and after considering the decision of this Court in the case of *Commissioner of Income Tax vs. President Industries* reported in 258 ITR 654. However, it is clarified that we have not expressed any opinion on merits whether in the facts and circumstances of the case, the decision of this Court in the case Commissioner of Income Tax vs. President Industries (supra) will be applicable or not. It is ultimately for the learned tribunal to consider the same in the facts and circumstances of the case.

5.00. With this, all these appeals are allowed in part and the same are remanded to the learned tribunal to consider the issue with respect to addition made towards alleged bogus purchases/sales and to consider the decision of this Court in the case of *Commissioner of Income Tax vs. President Industries* reported in 258 ITR 654. As stated hereinabove, so far as Question nos.2 and 3 are concerned, by our earlier order dtd. 1/10/2013 we have already dismissed the present appeals. Present appeals are allowed in part to the aforesaid extent only.