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CASE LAWS

Foreign:

Commissioner of Income Tax, Gujarat
v.
Gujarat Fluoro Chemicals

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ARTICLE

TAX NEWS

Kind regards

Mrs. Huzaima Bukhari
Editor

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Vodafone Tax Saga

by
Sagar Wagh

One of the world's "hottest" tax dramas of our times is the long legal battle between Vodafone and Indian authorities. The mobile telecommunications giant got tangled into a multi-billion tax dispute with India's revenue service in the year 2007 when it acquired Hutchinson Essar, a local mobile operator from international group Hutchinson International. The fact that, the aforesaid purchase occurred through exchange of offshore (shell) companies outside of India, didn't prevent the Indian tax authorities from claiming a 2.5 billion dollars capital gains tax.

Last year, when after a series of episodes, the honorable Supreme Court of India ruled in favor of Vodafone, everyone thought that, Vodafone's long-drawn legal battle with Indian revenue authorities had come to an end. However, Vodafone's victory celebration was short-lived, as the Indian government jumped into the game and introduced retroactive amendments to the tax law, imposing capital gains tax on the offshore transactions that took place in the previous years.

The dispute involves acquisition by 'Vodafone International Holdings BV' (Vodafone Netherlands) of the entire share capital of Cayman Islands' based 'CGP Investments Holdings' (CGP) from 'Hutchison Telecommunications International' (HTIL)—another Cayman Islands company. CGP through various intermediate companies and contractual arrangements held controlling interest in 'Hutchison Essar Ltd' (HEL), an Indian entity. HEL along with its Indian subsidiaries held licenses for providing cellular services in 23 telecom circles in India.

According to Indian income tax rules as it then stood, the pre-condition for non-resident to be taxable to capital gains income in India was that, the capital asset prior to its transfer should be situated in India. In this high profile case, the revenue authorities sought to tax the capital gains arising from the sale of CGP shares by alleging that CGP's shares derived its value from HEL's underlying business and assets in India. Thus, the sale of CGP shares was in substance a transfer of Hutch's "controlling interest in an Indian entity," which is a capital asset situated in India. The use of offshore vehicles by Vodafone and Hutch was viewed as a pure tax avoidance act.

However, much to the disappointment of the tax authorities, the Supreme Court of India looked at the transaction holistically and held that the transaction was a genuine business transaction which involved sale of CGP's shares so as to facilitate Hutch's exit from Indian telecom business and enable Vodafone to take up such business in India. As exiting a business is an important right of any strategic investor, it was held that, such transaction was a genuine business transaction and not just a tax avoidance scheme.

The Supreme Court's judgment came as a relief to many international investors operating in India and worldwide. It reinforced the idea that dealing between two non-resident entities is out of the scope of local tax authorities. But the issue had already become political and the response of the administration didn't take long to appear. In order to nullify the Supreme Court's judgment, the Indian government through Finance Act 2012 retroactively amended source rules provided in Income Tax Act, and stipulated that "a capital asset, being share or interest, in any foreign entity shall be deemed to be capital asset situated in India, if such share or interest derives directly or indirectly its value substantially from the assets located in India." Further, in order to subject Vodafone to tax, the Finance Act provided a validating clause which stated that "amended source rules would apply irrespective of previous judgment delivered by any court."

To fight against the retrospective character of the amendment, Vodafone Netherlands took recourse to the India-Netherlands Bilateral Investment Promotion and Protection Treaty (BIT).However, in the first quarter of 2013, Vodafone was issued reminder notices for payment of tax. In response to these notices, instead of commencing arbitration proceedings under BIT, Vodafone offered a compromise in the form of a non-binding conciliation of the tax dispute with the Indian government. The government seems to look favorably to this proposal, and is in the process of introducing new provisions in income tax statute in order to facilitate such conciliation. Most probably, Vodafone's tax liability will be reduced by waiving off interest and penalty as part of such conciliation.

It is important to note that, although Indian legislature can reverse Supreme Court decisions by introducing a retroactive amendment to the statute, such retroactive amendment can only change the law *in general*, that is in such a way as to affect a whole class of persons and events at large, and not the persons who were parties to that decision whose rights and liabilities had attained finality by the aforesaid decision. In Vodafone's case, by introducing this validating clause, the Indian legislature is attempting to function as an appellate court or tribunal which is legally impermissible (as per Apex court in Re Cauvery Case). Hence, the correct way forward for Vodafone would have been to challenge the validating clause and amendment in apex court rather than opting for non-binding conciliation.

The success of the retroactive amendment is still doubtful as the tax statute does not provide for mechanism to compute capital gains, without which, the source rules virtually lack teeth to subject similar kind of transactions to tax. Also most of the Double Tax Treaties entered into by India with other countries do not support the concept of indirect transfer of Indian business by the virtue of transfer of shares of a foreign company. However, the government's action is representative of a new way of dealing with international taxation and will certainly affect the perceptions of tax risk and compliance of multinational companies worldwide.

Invoking the Doctrine of 'per incuriam'

by
M. Govindarajan

The Judgments of High Courts and Supreme Court are binding on the lower courts. Whether the judgment of the higher authorities can be ignored or impugned? One such way is the invoking the doctrine of '*per incuriam*'

'*Per incuriam*' and *sub silentia* are exception to the concept of '*stare decisis*'. Sir John Salmond in his 'Treatise on jurisprudence' has aptly stated that the circumstances under which a precedent can be treated as '*per incuriam*'. A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute or delegated legislation.

The rule apparently applies even though the earlier court knew of the statutes in question but it did not refer to and had not present to its mind, the precise terms of the statute. Similarly a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand, such a mistake is again such '*incuria*' as to vitiate the decision. Even a lower court can impugn a precedent on such grounds.

C.C.K. Alien in 'Law in the Making' (Page No. 246) analyzed the concept of '*per incuriam*'. 'Incuria' means literally '*carelessness*' which apparently is considered less uncomplimentary than ignorantia; but in practice 'per incuriam' applies to mean 'per ignorantiam'. It would almost see that 'ignorantia juris neminem excusat' – except a Court of law, ignorance of what? Ignorance of a statute, or of a rule having statutory effect which would have affected the decision if the court had been aware of it.

One of the exceptions to the principle of 'star decisis' is where the court gives a decisionper incuriam because the provisions of a statute or authority of a case have not been brought to their attention. The concept gets attracted either when an important provision of law eluded the attention of the Court or where the Court was allusive to such provision while rendering the decision. Instances of per incuriam may also arise where the decision is rendered ignoring a binding precedent.

In 'Dr. Reddy's Laboratories Limited V. Commissioner of Central Excise & Service Tax, Hyderabad' – 2013 (3) TMI 86 - CESTAT BANGALORE the CENVAT credit taken by the appellant during the material period was reversed in the wake of audit objection. The department issued show cause notice demanding interest on inadmissible CENVAT credit. The appellant contended that no credit has been utilized by them and therefore they are not liable to pay interest. The

Adjudicating Authority rejected the contention of the appellant and confirmed the demand of interest. The appellant filed appeal before the Commissioner (Appeals) who confirmed the demand.

The appellant filed the present appeal before the Tribunal. The appellant contended that the CENVAT credit in question was never utilized and that they were reversed before the issuance of show cause notice. The Department relied on the Supreme Court's judgment in 'Union of India V. Indo Swift Laboratories Limited' – 2011 (2) TMI 6 - Supreme Court in which the Supreme Court held that the interest is liable to be paid on the inadmissible credit even though it had been reversed.

The appellant contended that the High Court, in 'Commissioner, LTU, Bangalore V. Bill Forge Limited, Bangalore' – 2011 (4) TMI 969 - KARNATAKA HIGH COURT has distinguished the Supreme Court judgment in 'Indoswift' case.

The Department contended that the ruling of the Supreme Court is binding on all courts and authorities in the country. The Department further contended that the basic provisions were overlooked by the High Court and it is not a good precedent to be followed. Obviously the concept of 'per incuriam' is being invoked against the High Court's decision.

The Tribunal held that the doctrine of 'per incuriam' is applicable against a judgment rendered in ignorance of any statutory provisions. It is applicable even in a case where the court which passed judgment was aware of the statute but the precise terms of the statute were not present to its mind. The finding of the High Court in 'Bill Forge' case that the CENVAT credit is taken at the time of removal of the product does not take into account of Rule 3(1) of the CENVAT Credit Rules, 2004 which provides for the 'taking' of CENVAT credit by a manufacture of excisable goods or a provider of taxable service upon receipt of inputs, input service and capital goods in the factory premises. There is no question of set off or adjustment at the time of taking of credit. The provisions of Rule 3are clear to this effect but the same did not enter into reckoning when the High Court decided the case of 'Bill Forge Limited'. Where a manufacturer or a service provider was required by the Revenue to pay interest on an amount of CENVAT credit taken (though inadmissible) and later on reversed without utilization for the period from the date of credit taking to the date of reversal, Rule 14 would be rendered otiose, which is definitely not the legislative intent. In other words, a finding in the context of examining interest liability under Rule 14, to the effect that reversal of CENVAT credit amounts to non taking of credit militates against the rule itself. In this view of the matter the Tribunal held that the doctrine of 'per incuriam' is applicable against the decision in 'Bill Forge Limited' case.

Buoyant Outlook for Aviation Industry Profits

Industry profits are expected to be considerably higher this year and next than in 2012 despite a downward revision to the International Air Transport Association's (IATA) latest global industry profitability outlook.

In its latest outlook, IATA expects industry profits to total USD11.7bn in 2013, on revenues of USD708bn, which is USD1bn lower than in IATA's June outlook.

IATA said that, although airline performance continued to improve in the third quarter, airlines suffered from a spike in oil prices associated with the Syria crisis and disappointing growth was reported in several key emerging markets.

IATA's revised profit outlook points to industry profits growing further to USD16.4bn in 2014, more than double the industry's performance in 2012 (USD7.4bn). This would make 2014 the second strongest year this century after the record-breaking profit of USD19.2bn seen in 2010.

"Overall, the story is largely positive. Profitability continues on an improving trajectory. But we have run into a few speed bumps. Cargo growth has not materialized, emerging markets have slowed, and the oil price spike has had a dampening effect. We do see a more optimistic end to the year, and 2014 is shaping up to see profit more than double compared to 2012," Tony Tyler, IATA's Director General and CEO, commented.

Airline performance remains strong. This year, airlines are expected to post the same operating margin (3.2 percent) as in 2006, even with a 54 percent hike in jet fuel prices. The industry has been able to absorb this enormous cost increase as a result of changes in the industry structure (through consolidation and joint ventures,) increased ancillary sales and reduced new entry due to tight financial markets. Moreover, the industry is expected to have a relatively good year even with subdued global economic growth at 2 percent. Previously 2 percent gross domestic product (GDP) growth was considered the point below which airlines would post losses.

Passenger growth remains robust at 5 percent, although slightly below the 5.3 percent previously projected, and below the 5.3 percent growth recorded in 2012. Passenger numbers are expected to grow to 3.12 billion – the first time that they have topped the 3 billion mark.

On a regional basis:

- North American airlines are expected to post the strongest profits of USD4.9bn (up from previous forecasts of USD4.4bn), representative of an Earnings Before Interest and Taxes (EBIT) margin of 4.3 percent. This is more than double the USD2.3bn profit of 2012. Passenger demand is expected to grow by a modest 2 percent, the slowest growth of any region, but this will outstrip the 1.6 percent expansion in capacity.
- European airlines are expected to record profits of USD1.7bn (up from June's forecast of USD1.6bn). While this is a considerable improvement on the USD400m profit that European carriers made in 2012, an EBIT margin of just 1.3 percent is the weakest among the major regions and well below the industry average of 3.2 percent. IATA expects a 4 percent expansion of passenger demand with only a 2.8 percent increase in capacity.
- The outlook for Asia-Pacific airlines has been downgraded by USD1.5bn to USD3.1bn largely driven by slower growth among the region's emerging economies. Passenger growth is expected to leap 6.6 percent, marginally lower than capacity growth of 6.9 percent.
- The outlook for Latin American carriers is unchanged at USD600m profits. Passenger demand growth of 6 percent is expected to outstrip capacity expansion of 5.3 percent.
- Middle East carriers are expected to post profits of USD1.6bn, marginally ahead of the USD1.5bn previously forecast. The region's efficient hubs continue to support strong performance on long-haul markets, and the impact of the Syrian crisis has been limited. Passenger demand is expected to grow by 10.5 percent – the strongest among all regions – but this will be slightly outstripped by capacity growth of 11.3 percent.
- In Africa, carriers will fall into losses of USD100m (down from a previously projected profit of USD100m). Long-haul markets face stiff competition, while intra-Africa market development remains constrained by a restrictive regulatory environment. Although African economies are among the world's fastest growing, the region's airlines face the significant impediments of high costs, onerous taxes, government interference, inefficient fleets, and poor

infrastructure. Demand growth is expected to be a robust 7.8 percent ahead of a capacity expansion of just 5.5 percent.

Looking ahead, IATA expects that all regions will see improved profitability, but divergence in performance will remain. The salient findings of its 2014 profit outlook include that:

- 2014 is expected to be particularly strong for North American carriers (USD6.3bn net profit, the industry's strongest) as the economy improves;
- European carriers are also expected to see a near doubling of profits to USD3.1bn (although even this will only generate an EBIT margin of 1.9 percent with only African carriers being lower);
- Asia-Pacific is expected to see a modest improvement in profitability to USD3.6bn, largely on the back of improved cargo performance;
- Middle East carriers are expected to post a USD2.1bn profit (their highest ever);
- Carriers in Latin America are expected to see profits rise to USD1.1bn; and,
- African airlines are also expected to return a combined profit of USD100m.

Tyler highlighted that even with the significant improvements expected for 2014, an industry profit of USD16.4bn implies a return on invested capital of just 5.2 percent. That remains significantly below the industry's weighted average cost of capital which is hovering between 7 percent and 8 percent.

"Airlines are demonstrating that they can be profitable in adverse business conditions. Efficiencies are being generated through myriad actions – consolidation, joint ventures, operational improvements, new market development, product innovations and much more. When market forces drive action, we get results that both strengthen the industry and benefit the consumer. Quite simply, stronger airlines can invest more in improving connectivity and service innovations. If more policy makers incorporated that into the cost-benefit analysis when developing regulations, we would have a much healthier industry generating even broader economic benefits," Tyler said..

"A USD16.4bn profit for transporting some 3.3 billion passengers means that airlines will retain an average of about USD5 per passenger. That very simple calculation demonstrates that even a small change in the operating environment – a new tax or other cost increase for example – could change the outlook quite significantly," he concluded. – *Courtesy tax-news.com*

OECD Lauds Japanese VAT Hike Decision

The Secretary General of the Organization for Economic Cooperation and Development Angel Gurria has warmly welcomed the announcement from Japanese Prime Minister Shinzo Abe that the nation will raise its consumption tax from its current five percent levy to eight percent from April 2014.

Gurria said: "With public debt now at around 230 percent of gross domestic product (GDP) and a comparatively low tax burden on consumption, the tax hike is crucial to assure the world that Japan will strengthen its public finances."

"As Abe himself has noted, this increase is essential to maintain confidence in Japan and establish a social security system that is sustainable for future generations. I congratulate Prime Minister Abe for this important step and also encourage the government to complete the second hike in the consumption tax rate to 10 percent in 2015."

The OECD highlighted that the tax hike is the first of many steps that are needed to achieve Japan's target of primary budget surplus by 2020. It encouraged Japan to continue to develop detailed and credible fiscal consolidation plans to further strengthen confidence in Japan's public finance. "Rapid population aging makes the need even more pressing: Japan's population, already the oldest among OECD member countries, is projected to remain the oldest through 2050, putting upward pressure on public social spending," it concluded. – *Courtesy tax-news.com*

African Tax System Seen As Constraint For Foreign Businesses

A new Africa Tax Survey, issued by PricewaterhouseCoopers (PwC) on October 1, and containing the results of answers provided by its international business clients operating in Africa, showed that tax is still considered to be one of the primary constraints on doing business in that continent.

In the survey, Paul de Chalain, Tax Leader, PwC Africa, commented that "the most significant findings confirm that doing business on the African continent is still a fairly large challenge. In particular, areas such as obtaining certainty around the application of legislation and discussing/negotiating with the tax authorities remain challenging."

In fact, tax was seen by the businesses surveyed to be the second-most significant threat for companies doing business in African countries, after political instability. It was said that "the countries that were considered as difficult countries to do business in, from both a tax and regulatory perspective, have remained largely the same. These include the Democratic Republic of the Congo, Angola, Nigeria and South Africa. Mozambique is a newcomer to the list."

Compliance with tax legislation and practice was found to be "by far the biggest challenge facing the tax functions of companies doing business in Africa." PwC pointed out that the number of tax audits has also increased significantly, possibly partly because "tax authorities initiate audits in order to meet certain revenue deadlines and targets."

With regard to specific taxes, withholding taxes were noted by PwC to represent a high-level concern for its survey's respondents. "By global standards withholding rates are generally high in Africa, particularly when considering that corporate tax rates are significant as well," it commented. "A significant number of respondents highlighted indirect taxes as an area of concern, suggesting that these taxes are often much more difficult to work with and recover than direct taxes."

However, while PwC had found that withholding taxes and expatriate taxes were considered to be the biggest challenges in its previous equivalent survey in 2007, transfer pricing has now also become a focal point for companies. Some African countries, it added, "are gaining more knowledge and sophistication, and some have already implemented specialized units for transfer pricing."

On the other hand, PwC noted that, although the exchange of information between countries is receiving greater attention, and "while base erosion and profit shifting are coming under greater scrutiny globally, companies active in Africa are split about the impact these have." – *Courtesy tax-news.com*

France Rules Out Revision Of CICE Tax Credit

Refusing to bow to pressure from his own party, French Budget Minister Bernard Cazeneuve has vehemently ruled out the idea of revising the CICE tax credit for competitiveness and employment, within the framework of the 2014 finance bill.

By way of a compromise, however, the Minister has pledged to review the effectiveness and the impact of the mechanism next year.

In a recent communiqué, the left-wing faction of President Hollande's Socialist Party (PS), "*Maintenant la gauche*," underlined the need for the Government to swiftly modify the CICE mechanism, to ensure that the corporate tax shelter does not benefit companies in France that are not subject to international competition, thereby better targeting the provision. The Government could then renounce plans to increase value-added tax (VAT) in France from January 1, 2014, the group insisted.

Defending the proposals, the left-wing group argued that a large part of the EUR20bn in CICE tax relief will benefit companies that simply are not at risk of relocating as they are not subject to fierce international competition. It is therefore neither "fair nor necessary" to increase VAT for all citizens in France, to finance, via the CICE, a tax reduction for retail companies and for building construction companies (BTP) for example, they explained.

Plans to raise the standard rate of VAT from 19.6 percent currently, to 20 percent, and to increase the intermediate rate of VAT from 7 percent to 10 percent next year, will increase the fiscal burden on households in France to the tune of around EUR6bn (USD8.1bn), the group warned. The measures will affect the most modest households in particular and prove extremely "counter productive" to efforts to stimulate consumption, the members emphasized, pointing out that the provisions will serve to significantly reduce the purchasing power of individuals.

The group nevertheless welcomed plans to reduce to from 5.5 percent to 5 percent the reduced rate of VAT benefiting basic commodities from January 1, 2014. – *Courtesy tax-news.com*

Japan Details Fiscal Stimulus Package

Japanese Prime Minister Shinzo Abe has confirmed that the Government is to provide a fiscal stimulus package, amounting to around JPY5 trillion (USD50.1bn), to counteract the recessionary effects of a 3 percent consumption tax rate rise due next year.

Abe had disclosed on October 1 his decision to proceed with the first stage of two-stage hike to Japan's consumption tax rate, starting with the increase from 5 percent to 8 percent in April 2014. A further increase to 10 percent is planned (but not yet decided upon) for later in 2015.

The following day, the Japanese Cabinet endorsed, and Abe announced the significant stimulus measures, including JPY1.1 trillion in tax policies, to prop up the economy and counteract the weaker consumer consumption expected after the rate increase.

As expected, the package includes some JPY730bn in tax incentives to boost business investment – for example, accelerated depreciation for companies spending on high-technology plant and machinery from April 1 next year – while JPY160bn in tax breaks will be provided for companies that increase their employees' wages by at least 2 percent in 2013 and 2014, and by 3 percent in 2015, an increase from the previous 5 percent minimum.

To reduce the drop in consumer spending, the Government will also, at a cost of JPY110bn, give tax incentives for property purchases to homebuyers with annual incomes of up to JPY5m, and will give a cash subsidy of up to JPY15,000 per individual to low-income households which do not earn enough to pay income tax.

Although the draft plan does not mention cutting Japan's high corporate tax rate, which had been the subject of some discussion previously within the Government, it has been disclosed that there will be consideration as to whether it would be possible to fund the JPY900bn cost of cancelling in March next year (one year earlier than planned) the special tax that is in force to provide resources for recovery following the earthquake, tsunami and ensuing nuclear power station disaster in March 2011.

The package will require parliamentary approval, and its details are expected to be finalized before the end of this year. Those details will include information on how the package is to be funded, although it is hoped to avoid the issuance of bonds that would increase further the high level of Japan's public debt. – *Courtesy tax-news.com*

German Transport Ministers Back Truck Toll Extension

During a meeting in Berlin, the Transport Ministers of Germany's federal states (*Länder*) unanimously backed plans to progressively expand the scope of the truck toll (*Lkw-Maut*), to include all 40,000 kilometers of major federal roads in Germany.

Determined to agree on a new roadmap to secure the future financing of Germany's dilapidated road network, federal state Transport Ministers pointed out that such a measure would serve to yield around EUR2.3bn (USD3.1bn) in additional revenue, vital for investment in infrastructure. Furthermore, the Ministers insisted that the idea of extending the truck toll to include smaller lorries should also be examined.

In a recent interview with Bild, German Transport Minister and Christian Social Union (CSU) member Peter Ramsauer conceded that of the EUR53bn in taxes paid by motorists in Germany each year, only EUR19bn flows directly to support the country's road network, pointing out that tax revenues are needed in other areas, including pensions. In contrast, income from toll charges flows entirely to the federal transport budget, Ramsauer explained.

Alluding to the fact that the *Lkw-Maut* is already being extended to four-lane federal highways (similar to motorways), Transport Minister Ramsauer warned of over tightening the fiscal screw. If the toll charge were to be applied to small trucks of 3.5 tons, many tradesmen would be affected by the move, he made clear, underlining his support instead for the introduction of a car toll (*Pkw-Maut*) for foreign motorists. This measure is a key priority for the CSU, Ramsauer added, expressing his confidence that a solution will be found on the issue with the party's future coalition partner. The fiscal burden on German motorists must on no account be increased, he ended.

Germany currently imposes a distance-based toll on all trucks in excess of 12 tons gross vehicle weight. The toll amount is based on a truck's emission category, on the number of axles, and on the length of the toll route. Initially applied to the use of the German motorway network, the truck toll was subsequently extended in August 2012 to include over 1,000 kilometers of four-lane federal highways, connected to the motorway network. These highways are predominantly in Bavaria, Lower Saxony, Hessen, and Baden-Württemberg.

In 2012, Germany's *Lkw-Maut* served to generate additional revenues for the state totaling around EUR4.4bn, of which Toll

Collect, the toll operator in Germany, received EUR600m. – *Courtesy tax-news.com*

Temporary Travel Costs Fully Tax Deductible, German Court Rules

Germany's Federal Fiscal Court (BFH) in Munich has ruled that temporary workers in Germany are able to deduct from income tax the full cost of journeys made to and from their place of work as a business expense, and not just half the cost, as is currently the case for permanent employees.

In case number VI R 43/12, the BFH explained that a company in Switzerland had recruited a worker from the German state of Baden-Württemberg on a temporary basis and for an "indefinite" and therefore unspecified timeframe. Following the termination of his contract, the temporary employee subsequently deducted from income tax the full cost of traveling to and from the workplace.

Rejecting the taxpayer's claim for entitlement to full tax relief, the German tax authorities insisted that it is only possible for an employee to deduct from tax as a business expense the costs incurred for a single journey to the place of work, in accordance with the commuting allowance provisions.

Siding with the plaintiff, the BFH deemed that in this case, the temporary employee should be considered in the same vein as an employee working for a certain period of time at a corporate client's place of work. The BFH had already ruled that under these circumstances employees are able to deduct the full commuting cost from income tax.

Justifying the decision in both cases, the Federal Fiscal Court agued that unlike permanent employees, temporary workers and employees subcontracted out by their employer are not in a position to lower their commuting expenses by seeking alternative routes or modes of transportation. – *Courtesy tax-news.com*

Liechtenstein, Malta Sign DTA

Liechtenstein's Foreign Minister Aurelia Frick and her Maltese counterpart George Vella have recently signed in New York a bilateral double taxation agreement (DTA) between the two countries in respect of taxes on income and on wealth.

The treaty is based on the Organization for Economic Cooperation and Development's Model Convention and reflects the current agreement policies of both treaty partner states.

The accord contains provisions clarifying and governing the entitlement to tax treaty benefits of Liechtenstein pension funds, charitable organizations, and investment funds. Furthermore, both countries have agreed within the framework of the DTA to waive withholding taxes on dividends, interest, and royalties. In addition, the treaty guarantees national taxing rights for the taxation of natural persons, and includes an information exchange clause in accordance with the international standard. The residency of trusts is regulated separately.

Finally, the DTA makes provision for an arbitration clause to ensure that within the framework of a specified process, a binding solution is achieved for both treaty partner states in the event of an interpretation or application dispute, thereby increasing legal certainty for investors.

The accord requires the parliamentary approval of both contracting jurisdictions. No additional legislative measures are required for implementation of the treaty, which is expected to apply from January 1, 2014.

Following the conclusion of this agreement, the Liechtenstein Government underlined its commitment to further expanding the Principality's DTA network, both within and outside of Europe. – *Courtesy tax-news.com*

Figures Reveal Tax Paid By Australian Mining Industry

The Australian minerals industry has paid almost AUD117bn (USD109.8bn) in company tax and royalties since 2006-07, according to accountancy firm Deloitte.

Reacting to the Deloitte Access Economics (DAE) data, the Minerals Council Australia said that the figures do not include a range of other taxes and charges, such as the soon-to-be-scrapped carbon tax and the Minerals Resource Rent Tax (MRRT). Nevertheless, the Council has stressed that the survey shows that Australians "are receiving a fair share from the mining sector."

The Council was also keen to dismiss calls for an even higher tax burden on the industry, describing such recommendations as "divorced from the facts and from any rational consideration of what Australia must do to remain an attractive investment destination and competitive supplier of minerals resources."

The Council's calculations put the total federal company tax contribution since 2006-07 at AUD69.7bn. The overall state royalty contribution over the same period is estimated to have been AUD47.2bn. The industry's effective tax rate has remained high and stable at an average in excess of 41 percent over the last five years.

An increasingly large proportion of the industry's tax contribution is now made up of royalty payments. Royalties were worth AUD9bn to the Treasury in 2011-12, up from the AUD3.6bn paid in 2006-07. A recent Council survey of 22 companies revealed that the royalty tax ratio rose from 13.9 percent in 2010-11 to 15.1 percent in 2011-12. – *Courtesy tax-news.com*

Irish Govt Urged To Tackle Black Market

The black market is hitting tax receipts and undermining recovery efforts in key sectors, Retail Ireland has warned.

According to Retail Ireland Chairperson Frank Gleeson, there is an "enormous" black market in tobacco, fuel, pharmaceuticals, entertainment, and counterfeit products. A report conducted for Retail Ireland by Grant Thornton estimates that the Exchequer loses at least EUR400m (USD541.5m) a year as a result of black market activity.

Gleeson believes that "if even some of this money could be recouped, it would greatly help the Government reach its targets, while also protecting retail jobs and boosting the domestic economy."

Among the remedial measures recommended by Retail Ireland are a freeze on excise duties and taxes, to prevent the price between legal and illegal products from widening, a fuel duty equalisation, and an end to dyeing fuel marked for agricultural use. Tougher penalties should be introduced for consumers who knowingly purchase illegal products, and the penalties imposed on those convicted should be increased.

Retail Ireland also argues that police and Revenue resources should be prioritized, to detect and deter illicit trade, and that consumer awareness campaigns ought to inform consumers of the damage inflicted by the black market.

“These policies, and many others, should form part of a strategic plan to tackle illicit trade, led by a Government steering group and comprised of Government departments. Such a joined-up approach will see the Exchequer benefit, and criminals lose out,” Gleeson said. – *Courtesy tax-news.com*

Abbott Comments On Tax On Migrant Workers

The new Australian Prime Minister has said that he is pleased that migrant workers from New Zealand “know that they are expected to work and pay taxes from day one.”

Tony Abbott made the comment during a joint press conference with his New Zealand counterpart John Key. He said that it was “right and proper” that New Zealanders have better access to Australia than citizens from other countries, and that he is “delighted” that a majority of Kiwis comply with the tax rules.

Abbott is nevertheless “happy to keep talking to Prime Minister Key and obviously I’m happy to have questions from New Zealanders on this subject.”

New Zealanders working in Australia are required to obtain a Tax File Number (TFN) and pay Australian tax. Without a TFN, an employer will withhold tax at the maximum rate, plus the Medicare levy.

In June, the two countries finalized arrangements for a new trans-Tasman retirement savings portability scheme. Since July 1, individuals have been able to transfer their retirement savings between certain Australian funds and New Zealand KiwiSaver schemes. Under the system, retirement savings are generally subject to the rules in the host country, and are exempt from entry and exit taxes. – *Courtesy tax-news.com*

Gibraltar Funds On The Rise

The number of funds in Gibraltar increased from 20 in 2006 to 215 in 2012, according to the Financial Services Commission.

The total value of assets administered in Gibraltar grew from GBP214m (USD346m) to GBP3.48bn over the same period.

Hedge fund managers are attracted to the British overseas territory because of its low tax rates and laws which allow managers to market funds throughout the European Union. The profits of companies in Gibraltar are generally taxed at just 10 percent. – *Courtesy tax-news.com*

2013 TRI 1670 (S.C. Ind.)

SUPREME COURT OF INDIA

H.L. Dattu, Sudhansu Jyoti Mukhopadhaya and M.Y. Eqbal, JJ.

Commissioner of Income Tax, Gujarat
v.
Gujarat Fluoro Chemicals

FACTS/HELD

Section 244A: The department is not obliged to pay interest on interest as that is not provided in the law. Sandvik Asia 280 ITR 643 (SC) awarded compensation for inordinate delay on its facts

1. In Sandvik Asia 280 ITR 643 (SC) the Supreme Court held that if the department delays paying interest on the refunded amount, the assessee is entitled to interest on interest. Subsequently, in CIT vs. Gujarat Flouro Chemicals, a view was expressed that Sandvik Asia 280 ITR 643 (SC) did not lay down the correct law and ought to be reconsidered. The matter was referred to a larger Bench. HELD by the larger Bench:

   > The judgment in Sandvik Asia 280 ITR 643 (SC) has been misquoted and misinterpreted by the assessees and also by the Revenue. Their view that in Sandvik case this Court had directed the Revenue to pay interest on the statutory interest in case of delay in the payment and that the Revenue is obliged to pay an interest on interest in the event of its failure to refund the interest payable within the statutory period is not correct. In Sandvik Asia, the Court was considering the issue whether an assessee who is made to wait for refund of interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court came to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same but not an

interest on interest. S. 244A provides for interest on refunds under various contingencies. It is clarified that it is only that interest provided for under the statute which may be claimed by an assessee from the Revenue and no other interest on such statutory interest.

Oder accordingly.

Special Leave Petition (C) No. 11406 of 2008 with Special Leave Petition (C) Nos. 14048, 14050, 14051, 14049, 14768, 20154, 21851, 25727, 27453, 27454, 27455, 27456, 27457, 27458, 27459, 27460, 27461, 27462, 27463, 27677 of 2012, 5730 of 2013, Civil Appeal No. 6301 & 7217 of 2011, 2534 of 2012, 2535, 2536, 2537, 2539, 2540, 2541, 2542, 2543, 2944, 2945, 3436, 3437, 3445, 3446, 5408, 7596, 7772, 4630, 3825, 3826, 4335, 4336, 4337, 4338, 4339, 4340, 4341, 4342, 4343, 4344, 4345, 4346, 4347, 4348, 4349, 4350, 4351, 4352, 4353, 4354, 4355, 4356, 4357, 4358, 4359, 4360, 4361, 4362, 4363, 4364, 4365, 4366 of 2012, 2589 &, 5478 of 2013.

Decided on: 18th September, 2013.

JUDGMENT

H.L. Dattu, J.–

1. Doubting the correctness or otherwise of the decision of this Court in the case of Sandvik Asia Limited vs. Commissioner of Income Tax & Ors., (2006) 2 SCC 508, a bench of two learned Judges has referred the following question of law for our consideration and authoritative pronouncement by order dated 28.08.2012:

> "The question which arises in this case is, whether interest is payable by the Revenue to the assessee if the aggregate of installments of Advance Tax OF TDS paid exceeds the assessed tax?"

2. In the aforesaid order of reference, this Court has briefly noticed the facts and the discussion in Sandvik case (supra) wherein, the main issue for consideration and determination by this Court was, whether the assessee is entitled to be compensated by the Revenue for delay in payment of the amount admittedly due to the assessee. This Court has noticed inter alia the provisions of Section 214 of the Income Tax Act, 1961 (for short 'the Act') and in light of the same has doubted the correctness of the decision in Sandvik case (supra).

3. In order to answer the aforesaid issue before us, we have carefully gone through the judgment of this Court in Sandvik case (supra) and the order of reference. We have also considered the submissions made by the parties to the lis.

4. We would first throw light on the reasoning and the decision of this Court on the core issue in Sandvik case (supra). The only issue formulated by this Court for its consideration and decision was whether

an assessee is entitled to be compensated by the Income Tax Department for the delay in paying interest on the refunded amount admittedly due to the assessee. This Court in the facts of the said case had noticed that there was delay of various periods, ranging from 12 to 17 years, in such payment by the Revenue. This Court had further referred to the several decisions which were brought to its notice and also referred to the relevant provisions of the Act which provide for refunds to be made by the Revenue when a superior forum directs refund of certain amounts to an assessee while disposing of an appeal, revision etc.

5. Since, there was an inordinate delay on the part of the Revenue in refunding the amount due to the assessee this Court had thought it fit that the assessee should be properly and adequately compensated and therefore in paragraph 51 of the judgment, the Court while compensating the assessee had directed the Revenue to pay a compensation by way of interest for two periods, namely; for the Assessment Years 1977-78, 1978-79, 1981-82, 1982-83 in a sum of Rs.40,84,906/- and interest @ 9% from 31.03.1986 to 27.03.1998 and in default, to pay the penal interest @ 15% per annum for the aforesaid period.

6. In our considered view, the aforesaid judgment has been misquoted and misinterpreted by the assessees and also by the Revenue. They are of the view that in Sandvik case (supra) this Court had directed the Revenue to pay interest on the statutory interest in case of delay in the payment. In other words, the interpretation placed is that the Revenue is obliged to pay an interest on interest in the event of its failure to refund the interest payable within the statutory period.

7. As we have already noticed, in Sandvik case (supra) this Court was considering the issue whether an assessee who is made to wait for refund of interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court had come to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same not an interest on interest.

8. Further it is brought to our notice that the Legislature by the Act No. 4 of 1988 (w.e.f. 01.04.1989) has inserted Section 244A to the Act which provides for interest on refunds under various contingencies. We clarify that it is only that interest provided for under the statute which may be claimed by an assessee from the Revenue and no other interest on such statutory interest.

9. With the aforesaid clarification we now refer back all the matters before a Two Judge Bench of this Court to consider each case independently and take an appropriate decision one way or the other.

Ordered accordingly.
