Volume-10 May -2015 Pages 1-23

SBS Wiki

monthly e-Journal

By

SBS and Company LLP
Chartered Accountants

BUDGET MEET 2015

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DIRECT TAXES

CHANGES MADE TO FINANCE BILL, 2015 (BILL PASSED IN NEW AVATAR)

Contributed by CA Ram Prasad |

MAT- Applicability to Foreign Company:

➢ Original Proposal in Finance Bill, 2015:

The Finance Bill, 2015 presented originally proposed that long-term capital gains and short-term capital gains (on which STT is paid) arising to FIIs would be excluded from the chargeability of MAT. Further, expenditures, if any, debited to the profit and loss account, corresponding to such income would also added back to the book profit for the purpose of computation of MAT.

(The impact of such proposal would be that foreign companies would be liable to pay MAT even on that income which was exempt from tax by virtue of DTAAs or Income-tax Act.)

➢ New Change:

Finance Bill, 2015 as passed by LokSabha proposes to provide relief from MAT to foreign companies as well. Capital gains from transfer of securities, interest, royalty and FTS accruing or arising to foreign company has been proposed to be excluded from chargeability of MAT if tax payable on such income is less than 18.5%. Further, expenditures, if any, debited to the profit loss account, corresponding to such income shall also added back to the book profit for the purpose of computation of MAT.

Business Trust (SPV) related:

The Finance (No. 2) Act, 2014 inserted clause (xvii) in Section 47 to provide that transfer of share of special purposes vehicle ('SPV') to a business trust in exchange of units allotted by that trust to the transferor shall not be regarded as transfer, thus, no capital gain would arise on such transaction.

➢ Original Proposal in Finance Bill, 2015:

Finance Bill, 2015 as passed by LokSabha proposes to exclude from chargeability of MAT any notional loss arising from transfer of asset or notional loss arising from change in carrying amount of units(units allotted by the business trust on transfer of shares of SPV to a business trust) and actual loss from transfer of said units shall be added back to the book profit for the purpose of computation of MAT.

➢ New Change:

A new clause is proposed to be inserted to re-compute the loss from transfer of said units which shall be reduced from the book profit. It is proposed that the amount of loss from transfer of said units shall be computed by taking into account the cost of shares exchanged with units or the carrying amount of the shares at time of exchange where such shares are carried at a value other than the cost through profit & loss account.

Medical Insurance:

➢ Original Proposal in Finance Bill, 2015:

The Finance Bill, 2015 as presented originally omitted to propose amendment to clause (a) and clause (b) of sub-section (2) of Section 80D to enable assessee to claim deduction of Rs. 25,000 instead of Rs. 15,000. However, sub-section (4) of Section 80D was amended to allow deduction of Rs. 30,000 instead of Rs. 25,000 if individual or his family member or any of his parent is a senior citizen or very senior citizen.

New Change:

Accordingly, it is proposed in the Finance Bill, 2015 as passed by the LokSabha that the existing deduction of Rs. 15,000 shall be substituted with Rs. 25,000.

Residential Status of a Company (POEM):

➢ Original Proposal in Finance Bill, 2015:

The Finance Bill, 2015 as presented earlier proposed to amend Section 6 to provide that a company *(Other than Indian Company)* shall be said to be resident in India if its place of effective management, *at any time* in that year, is in India. In other words, the concept of Control or Management (wholly in India) is replaced with Place of Effective Management (at any time in India).

➢ New Change:

Finance Bill, 2015 as passed by the LokSabha has *proposed to omit* the words '*at any time*' which shall have effect that a company shall be deemed to be resident in India if its place of effective management is in India.

Mandatory Filing of Income by ROR:

➢ Original Proposal in Finance Bill, 2015:

The Finance Bill, 2015 as passed by the LokSabha has proposed mandatory filing of return by a person, being Resident and Ordinarily Resident in India who at any time during the previous year -

(I) Holds any asset, as beneficial owner or otherwise, (including financial interest in any entity) located outside India or has signing authority in any account located outside India; OR

(II) As a beneficiary of any asset (including any financial interest in any entity) located outside India.

- New Change:

'Beneficial owner' in respect of an asset *means* an individual who has provided, directly or indirectly, *consideration* for the asset for the immediate or future benefit, direct or indirect, of himself or any other person;

'Beneficiary' in respect of an asset *means* an individual who derives benefit from the asset during the previous year and the consideration for such asset has been provided by any person other than such beneficiary.

Definition of Income:

- New Change:

It is proposed to amend the definition of 'Income' under Section 2(24) in the Finance Bill, 2015 as passed by the LokSabha.

A *new* sub-clause (xviii) is proposed to be inserted in Section 2(24) to provide that assistance in the form of a subsidy or grant or cash incentive or duty drawback or waiver or concession or reimbursement (by whatever name called) by the Central Government or a State Government or any authority or body or agency in cash or kind to the assesse [other than one considered under Explanation 10 to Section 43(1)] would be included in assessee's income.

Thus, any subsidy which is not reduced from the actual cost of the asset in view of provisions of Explanation 10 to Section 43(1) shall be taxable as revenue receipts of the assessee.

Claim for Bad debt:

- Position as of now:

No deduction is allowed to an assessee if any income not recorded in books of accounts but offered to tax as per Income Computation and Disclosure Standards, turns into bad-debts. In other words, assessee cannot write-off a debt which was not recorded in the books of account but was actually offered to tax. In this case, no deduction is allowable to assessee as debts are not written-off from books of accounts.

- New Change:

It is proposed in the Finance Bill, 2015 as passed by the LokSabha that bad-debts could be claimed without writing off in books of account if the amount of debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof becomes irrecoverable or of an earlier previous year on the basis of income computation and disclosure standard notified under section 145(2) without recording the same in the accounts.

Interest on loan taken for acquisition of an asset:

- Position as of now:

Deduction for interest paid in respect of capital borrowed for the purposes of the business or profession while computing the income from business or profession.

However, any interest paid in respect of capital borrowed for acquisition of an asset for extension of *existing business or profession* (whether capitalized in the books of account or not) for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, was not allowed as deduction.

- New Change:

The Finance Bill, 2015 as passed by LokSabha proposes to remove this distinction in allowability of interest in case of existing business and in case of extension of existing business. It proposes to remove the words "for extension of existing business or profession" from proviso to Section 36(1)(iii). Thus, it is proposed that interest on borrowings used for acquisition of asset till the asset is put to use shall not be allowed as deduction in any case.

Period of Holding and cost of acquisition in respect of shares acquired on redemption of GDR;

- New Change:

The Finance Bill, 2015 as passed by the LokSabha proposes that the period of holding in this case shall be reckoned from the date on which a request for redemption is made by the assessee.

The cost of acquisition shall be computed in accordance with sub-section (2ABB) proposed to be inserted in Section 49 by the Finance Bill, 2015 as passed by the LokSabha.

It is proposed that cost of acquisition of shares acquired by a non-resident on redemption of GDRs shall be the price of such shares as prevailing on any recognized stock exchange on the date on which a request for redemption is made by the assessee.

Foreign Portfolio Investors:

- Position as of now:

Income arising to Foreign Portfolio Investors ('FPIs') from transaction in securities will be treated as capital gains. (FA(No.2) 2014)

Finance Bill 2015 introduced section 9A for providing clarity on issues relating to business connection or Permanent Establishment status for off shore funds subject to fulfilment of conditions.

➢ New Change:

The Finance Bill, 2015 *as passed by the LokSabha proposes to withdraw* following conditions in case of an investment fund set-up by the Government or Central Bank of a foreign State or a sovereign fund or any other notified fund:

(a) The fund has a minimum of 25 members who are, directly or indirectly, not connected persons;

(b) Any member of the fund along with the connected persons shall not have participation interest, directly or indirectly, in the fund exceeding 10%; and

(c) The aggregate participation interest, directly or indirectly, of ten or less members along with their connected persons in the fund, shall be less than 50%.

It is proposed to insert sub-section (7A) in Section 9A that the provisions of this section shall be applied in accordance with such guidelines and in such manner as the Board may prescribe in this behalf.

Deduction for Co-operative Society engaged in manufacture of sugar cane:

➢ New Change:

A new clause (xvii) is proposed to be inserted in Section 36(1) to provide that the amount of expenditure incurred by a co-operative society engaged in the business of manufacture of sugar for purchase of sugarcane could be allowed as deduction; however, the deduction couldn't exceed the price fixed or approved by the Government for sugarcane.

Section 10(23EE):

➢ Position as of now:

Income by way of contributions to the Investor Protection Fund set- up by recognized stock exchanges in India, or by commodity exchanges in India or by a depository shall be exempt from taxation.

➢ New Change:

It is proposed to exempt the income of the Core Settlement Guarantee Fund arising from contribution received and investment made by the fund and from the penalties imposed by the Clearing Corporation subject to similar conditions as provided in case of Investor Protection Fund set-up by a recognized stock exchange or a commodity exchange or a depository.

Additional Depreciation and Investment Allowance allowed to industries set-up in Bihar and West Bengal:

- Original Proposal in Finance Bill, 2015:

The Finance Bill, 2015 proposed to allow higher additional depreciation at the rate of 35% (instead of 20%) in respect of the actual cost of new machinery or plant acquired and installed by a manufacturing undertaking or enterprise set-up in the notified backward area of the State of Andhra Pradesh and the State of Telangana in respect of acquisition and installation of any new machinery or plant during the period between 01-04-2015 and 31-03-2020.

Similarly, it is proposed to insert a new section 32AD to provide for an additional investment allowance of an amount equal to 15% of the cost of new asset acquired and installed by an assessee, if:

(a) it sets-up an undertaking or enterprise in any notified backward areas in the State of Andhra Pradesh and the State of Telangana; and

(b) the new assets are acquired and installed during the period between 01-04-2015 and 31-03-2020.

- New Change:

The Finance Bill, 2015 as passed by the LokSabha proposes to extend the benefit of additional depreciation and investment allowance to the manufacturing undertaking or enterprise set-up in the notified backward area of State of Bihar and State of West Bengal as well.

Settlement Commission-Interest U/S 234B:

- Original Proposal in Finance Bill, 2015:

A New subsection (2A) is proposed to be introduced to in section 234B-

- where an assessee has made an application under subsection (1) of section 245C for any assessment year, he shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the 1st day of April of such assessment year and ending on the date of making such application, on the additional amount of income-tax referred to in that sub-section;

- To provide for levy of interest as a result of an order of the Settlement Commission U/S 245D(4) @ 1% for every month or part of a month comprised in the period commencing on the 1st day of April of such assessment year and ending on the date of such order, on the amount by which the tax on the total income determined on the basis of such order exceeds the tax on the total income disclosed in the application filed under sub-section (1) of section 245C.

- New Change:

Where as a result of an rectification order U/S 245D(6B) the amount referred to in section 234B(2A) ,on which interest is computed, is increased or reduced, the interest shall be increased or reduced accordingly.

Authority for Advance Ruling- 245-O:

- New Change(New Clause 61A):

In section 245-O (3)(d) " A Law Member from Indian Legal Service, who is or is qualified to be, to be an Additional Secretary to the Government of India" shall be substituted.

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COMPANIES ACT

DORMANT COMPANY, UNDER COMPANIES ACT, 2013

Contributed by CS Phanindra DVK |

The concept of Dormant Company was neither defined under the Companies Act, 1956 nor is defined under the Companies Act, 2013.

Under the Companies Act, 1956, there was a concept called the Defunct Company (Section 560), and the Registrar of Companies may with reasonable cause believes that any company is not carrying on business or is in operation, or has not been filing returns regularly, send notice to the company, and after giving reasonable opportunity may strike off the name of the Company from the Register of Companies.

Under the MCA-21 project, the status of Dormant can be seen for companies, which are not available for e-filing of returns, as seen below in the picture.

Whether listed or not	:	Listed Unlisted
Date of Last AGM	:	(dd/mm/yyyy)
Date of Balance sheet	:	(dd/mm/yyyy)
Company Status (for eFiling)	:	Dormant
Charges Registered		
Signatories of the Company		

Thus, there were many companies which were actually formed for the purpose of a future project, which may take many years to start, and till then they had to file the periodical returns, or else, they would become Defunct company, and ROC may proceed ahead such companies.

The above shortfall has been addressed in the Companies Act, 2013, with the introduction of a new provision (Section 455), as per which:

➔ (i) A Company is formed and registered under this Act:

(a) for a future project; or
(b) to hold an asset; or
(c) intellectual property;

and has no significant accounting transaction; or

➔ (ii) An inactive company i.e., a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years;

may make an application to the Registrar for obtaining the status of a dormant company.

Explanation:

"Significant accounting transaction" means any transaction other than:-

(a) payment of fees by a company to the Registrar;
(b) payments made by it to fulfil the requirements of this Act or any other law;
(c) allotment of shares to fulfil the requirements of this Act; and
(d) payments for maintenance of its office and records.

Application for seeking Status of Dormant Company:

(a) Eligibility:

The Eligible companies which can make an Application for seeking Dormant Status is as below:

- ➔ the securities of the company are not listed on any stock exchange within or outside India;
- ➔ no inspection, inquiry or investigation has been ordered or taken up or carried out against the company;
- ➔ no prosecution has been initiated and pending against the company under any law;
- ➔ the company is neither having any public deposits which are outstanding nor the company is in default in payment thereof or interest thereon;
- ➔ the company is not having any outstanding loan, whether secured or unsecured;
- ➔ there is no dispute in the management or ownership of the company;
- ➔ the company has not defaulted in the payment of workmen's dues;

(b) Application:

After fulfilling that the company does not fall under any of the requirement above, approval of the members needs to be obtained way of Special Resolution at General Meeting or after issuing a notice to all the shareholders of the company for this purpose and obtaining consent of atleast 3/4th shareholders, in value.

Application in Form MSC-1, is to be made and, the following documents are to be attached to the application:

- ➔ Copy of the Board Resolution authorising to make the application;
- ➔ Copy of special resolution passed by the members;
- ➔ Auditor's certificate;
- ➔ Statement of affairs duly certified Chartered Accountant or Auditor(s) of the company;
- ➔ Consent of the lender if any loan is subsisting;

- ➔ Certificate by the Board of Directors and Shareholders, that there is no dispute in the management or ownership in the Company;
- ➔ Undertaking by the Board of Directors that the application is not with an intention to deceive the creditors or to defraud any other person.

and fees to be paid on the form

Upon satisfying himself about the completeness of the application, the Registrar of Companies may allow for Dormant Status and to this effect will issue a Certificate in Form MSC-2.

Register of Dormant Companies:

The Registrar of Companies to maintain a register of Dormant Companies and shall be displayed in the MCA site or such other website as notified by the Central Government.

ROC's Power to direct companies to be entered as Dormant and to strike off the company:

Where a company has not filed financial statements or annual returns for 2consecutive financial years, the Registrar shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies.

Minimum requirement by Dormant Companies:

➔ Directors:

Dormant Companies shall have minimum 3 Directors in case of Public Companies and 2 Directors in case of Private Companies.

➔ Yearly Return:

A Yearly return is to be filed with the Registrar of Companies in Form MSC-3, within a period of 30 days from the end of the financial year, alongwith the following details:

(a) Duly audited Financial Statement;
(b) Number of Directors in the Company;
(c) Particulars as to Board Meetings;
(d) Details as to change in the management in the Company, if any;
(e) Details of transactions, if any, other than significant transactions;
(f) Particulars as to allotment of shares, if any;
(g) Particulars of Annual Fees paid (to be paid along with the form);
(h) Details as to whether any significant transactions have been carried during the year;
(i) Shareholding pattern of the Company

Privileges available to Dormant Companies:

1. Board meetings:

   Dormant company can have at least one meeting of the Board of Directors, conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days.

2. Attaching of Cash Flow Statement:

Cash Flow Statement need not be included in the Financial Statements, filed in respect of a Dormant Company.

3. Rotation of Auditors:

Rotation of Auditors is not applicable to Dormant Companies.

ROC's Power to strike off the company:

➔ The Registrar shall strike off the name of a dormant company from the register of dormant companies, which has failed to comply with the requirements as applicable to a Dormant Company, under the Act.

➔ Where a dormant company does or omits to do any act mentioned in the Grounds of application in Form MSC-1 submitted to Registrar for obtaining the status of dormant company, affecting its status of dormant company, the directors shall within seven days from such event, file an application, for obtaining the status of an active company.

➔ Where the Registrar has reasonable cause to believe that any company registered as 'dormant company' under his jurisdiction has been functioning in any manner, directly or indirectly, he may initiate the proceedings for enquiry under section 206 (power to call for information, inspect books and conduct enquiries) of the Act and if, after giving a reasonable opportunity of being heard to the company in this regard, it is found that the company has actually been functioning, the Registrar may remove the name of such company from register of dormant companies and treat it as an active company.

➔ The Registrar shall initiate the process of striking off the name of the company if the company remains as a dormant company for a period of consecutive five years.

Application for change of status from Dormant to Active:

Application to be made by the Company in Form MSC-4, along with the Board resolution, authorising to make the application, and upon satisfaction, ROC may change the Status from Dormant to Active, and issue Certificate in Form MSC-5.

This article is contributed by CS Phanindra DVK, an Associate to SBS and Company LLP, Chartered Accountants. The author can be reached at phanindra@sbsandco.com

COMPANIES ACT

LLP COMPLIANCES - MAY – 2015 - FILING OF ANNUAL RETURN

Contributed by CS Phanindra DVK |

As part of the Financial Disclosures, pursuant to Section 35 of the LLP Act, 2008, read withRule 25 of the LLP Rules, 2009, every LLP shall file Annual Return with the concerned Registrar of LLP within Sixty (60) days of closure of its financial year.

A. Due Date:

The Annual Return is to be filed within Sixty (60) days of closure of the financial year. i.e., 30th May of every year.

B. Form in which Annual Return to be filed with Registrar of LLP:

The Annual Return is to be filed inLLP Form No.11, mentioning the details as to:

- the Partners;
- Contribution received from them against their obligation;
- Details of any penalties imposed on the LLP/Partner/ Designated Partners, and details of interests of the Partners/Designated Partners in other entities.

C. Certification of Annual Return:

(i) By the Designated Partners themselves:

The Annual Return of an LLP having turnover of upto Rs.5 Crores, during the corresponding Financial Year or contribution of upto Rs. 50 Lakhs, shall be accompanied with a certificate from a Designated Partner, other than the signatory to the annual return, to the effect that annual return contains true and correct information.

(ii) By a Company Secretary in Practice:

In all other cases, the annual return shall be certified by a Company Secretary in practice to the effect that he has verified the particulars from the books and records of the LLP and found them to be true and correct.

D. Penalty:

If LLP fails to comply with the requirement, then:

the LLP shall be punishable with fine : Not less than Rs.25,000/-, which may extend to Rs.5,00,000/- [Sec.35 (2)].

Every Designated Partner shall be punishable with fine: Not less than Rs.10,000/- which may extend to Rs.1,00,000/- [Sec.35(2)].

In addition to the above, additional fees of Rs.100/- for each day of delay in filing the return, after 30 days.

This article is contributed by CS Phanindra DVK, an Associate to SBS and Company LLP, Chartered Accountants. The author can be reached at phanindra@sbsandco.com

SERVICE TAX

RATE OF SERVICE TAX VIS-À-VIS TAXATION

Contributed by CA Sri Harsha |

The rate of service tax has been increased from 12.36% to 14%/16% from a date to be notified. The above change in the rate of service tax has been introduced in the Finance Bill, 2015. In light of the proposed new rate of service tax, we wish to analyse certain issues in this article in the form of Frequently Asked Questions.

FAQ 1: Is the new rate of service tax effective from 01.03.2015/01.04.2015?

Response:

No, the new rate of service tax shall come into effect from a date to be notified post enactment of Finance Bill, 2015. Hence, the current rate of service tax shall continue to be applicable till such date of notification.

FAQ 2: If the new rate of service tax has been collected from the customers, what are the recourses available to the service provider?

Response:

Any amount which is collected from the service receiver representing such amount as service tax shall be deposited to the credit of Central Government in terms of Section 73A of the Finance Act, 1994. Hence, even though the rate of service tax is 12.36% but the service provider in absence of adequate knowledge has collected 14%, the excess service tax is required to be paid to the credit of Central Government.

FAQ 3: We are engaged in provision of certain services. We have rendered the services before the new rate of service tax has been made effective. Now, we are contemplating to raise an invoice for the services provided after change in rate of tax? What rate of service tax has to be charged, 12.36% or 14%?

Response:

In the said question, it is clear that services were provided before change in rate of tax, however the invoice for the same has been issued post change in rate of tax. In such a case, the point of taxation shall be the date of invoice. However, if the payment has been received prior to such date of invoice, the point of taxation shall shift to the date of payment instead of date of invoice. Please refer Rule 4 of Point of Taxation Rules, 2011.

Example: Let us assume, the new rate of service tax is made effective from 15.05.15, and the services were provided in April, 2015. The invoice is contemplated to be raised in May, 2015. In such a scenario, the invoice has to be raised with new rate of service tax that is 14% and not 12.36%.

Further, assuming payment has been received in June, 2015, the due date for payment of service tax shall be 6th June, 2015, since the point of taxation shall be the date of invoice or the date of payment whichever is earlier.

<u>FAQ 4</u>: We are engaged in provision of certain services. We have rendered the services before the new rate of service tax has been made effective and an invoice to such an extent has been raised. However, the payment for the said service has been received post change in rate of tax. Whether any excess service tax (14%-12.36%) has to be collected from the service receiver?

<u>Response:</u>

Since the services were provided and an invoice to such extent has been raised before change in rate of tax, the point of taxation as per Rule 4 of the Point of Taxation Rules, 2011 shall be the date of invoice. Hence the service provider is not obliged to collect any further service tax from the service receiver.

<u>FAQ 5</u>: We are engaged in provision of certain services. We have rendered the services before the new rate of service tax has been made effective and payment to such an extent has been received. However, inv
<u>Respon</u>oice was raised after the change in rate of tax. Whether any excess service tax (14%-12.36%) has to be collected from the service receiver?

<u>Response:</u>

Since the services were provided and payment has been received before change in rate of tax, the point of taxation as per Rule 4 of the Point of Taxation Rules, 2011 shall be the date of payment. Hence the service provider is not obliged to collect any further service tax from the service receiver.

<u>FAQ 6</u>: We are engaged in provision of certain services. We have rendered the services after the new rate of service tax has been made effective. However, the invoice has been raised before the change in rate of tax and payment to such an extent has also been received prior to change in rate of tax. Our Head of Finance is in view that since service is provided after change in rate of tax, the service is taxable at new rate irrespective of the fact that the invoice and payment has been received prior to change of rate of tax. Whether the new rate or old rate shall be applicable?

<u>Response:</u>

Since the invoice and date of payment falls before the change in rate of tax, the old rate of service tax shall be applicable. As per Rule 4 of Point of Taxation Rules, 2011, the point of taxation in such a case, shall be the date of invoice or date of payment whichever is earlier and in the instant case, both of the events have taken place before the change in rate of tax. Hence, the old rate of service tax shall be applicable despite the fact the service is being provided in the new tax rate regime.

<u>FAQ 7</u>: We are engaged in provision of certain services. We have rendered the services after the new rate of service tax has been made effective and the payment for the said service has also been received post change in rate of tax. However, an invoice has been issued before the change in rate of tax and service tax has been shown as 12.36% in such invoice. Whether any excess service tax (14%-12.36%) has to be collected from the service receiver?

<u>Response:</u>

Since the date of payment has fallen post change in rate of tax, the point of taxation shall be the date of payment as per Rule 4 of Point of Taxation Rules, 2011 and accordingly the balance service tax that is (=14% - 12.36%) has to be collected by raising a supplementary invoice on the service receiver.

FAQ 8: We are engaged in provision of certain services. We have rendered the services after the new rate of service tax has been made effective and the invoice to such an extent has also been raised post change in rate of tax. However, the payment has been received before the change in rate of tax. In such an instance, whether any service tax (14%-12.36%) has to be refunded to the service receiver?

Response:

Since the service has been provided and invoice has been raised post change in rate of tax, the point of taxation shall be the date of invoice and hence the service tax shall be the new rate of service tax and in such a scenario, there is no requirement to refund the service tax to the service receiver.

FAQ 9: Section 67A of the Finance Act, 1994 states that applicable rate of service tax is the rate which is in existence at the time of provision or agreeing for provision of service. However, the point of taxation rules describe the applicable rate which is not in line with Section 67A, for example in certain instances the rate of service tax is as on the date of payment irrespective of point of provision of service. In such a case, whether the rate as per Section 67A or point of taxation has to be adopted?

Response:

The issue mentioned herein quite ambiguous. Section 67A is very clear in terms of the rate of service tax existing at the time of provision of service or agreeing for provision of service. Further, the said section nowhere makes any reference to the point of taxation rules. However, there is an explanation to the said section which makes a reference to the rules for determining the rate of exchange which makes the intention of the legislation clear that for rate of tax whatever stipulated in Section 67A assumes supremacy. In absence of specific reference to point of taxation rules, one can argue that the rate of tax which is existing at the time of provision or agreeing for provision of service can be adopted irrespective of what is stated in point of taxation rules, in general and Rule 4 of said rules in specific.

However, on harmonious interpretation of the service tax law, it can be inferred that the phrase 'provided or agreed to be provided' appearing in Section 67A has to be read with the definition of 'point of taxation' vide Rule 2(e) of Point of Taxation Rules, 2011 which states that 'means the point in time when a service shall be deemed to have been provided'. Hence, on a harmonious interpretation of the law, the point of taxation rules assumes significance and adoption of such rules shall be in accordance with the law.

We request the interested readers to go through the conflict between Section 67A and Point of Taxation Rules, 2011 in our forthcoming editions.

FAQ 10: We are in receipt of certain services wherein service tax on such service has to be paid by the service receiver under reverse/partial charge mechanism. We have received the services prior to change in rate of tax and payment to the vendor has been made post change in rate of tax. Now, for payment of service tax under reverse/partial charge obligation, which rate of tax has to be reckoned, whether 12.36% or 14%?

Response:

The point of taxation for the services falling under reverse/partial charge mechanism is the date of payment to the vendor as per Rule 7 of Point of Taxation Rules, 2011. Since in the instant case, the payment to the vendor has been made post change in rate of tax, the new rate of service tax has to be adopted for discharging the liability under reverse/partial charge mechanism.

FAQ 11: We are in receipt of certain services wherein service tax on such service has to be paid by the service receiver under reverse/partial charge mechanism. We have made payment to the vendor prior to change in rate of tax and received the services post change in rate of tax. Now, for payment of service tax under reverse/partial charge obligation, which rate of tax, has to be reckoned, whether 12.36% or 14%?

Response:

The point of taxation for the services falling under reverse/partial charge mechanism is the date of payment to the vendor as per Rule 7 of Point of Taxation Rules, 2011. Since in the instant case, the payment to the vendor has been made prior to change in rate of tax, the old rate of service tax has to be adopted for discharging the liability under reverse/partial charge mechanism despite of the fact that services were received post change in rate of tax.

FAQ 12: We are subsidiary company located in India and receive certain services from the holding company located outside India. The service tax on such services is required to be paid by us under the provisions of Section 68(2) of Finance Act, 1994 read with Service Tax Rules, 1994 and Notification No 30/2012-ST dated 20.06.2012. The challenge before us is, we have received a service prior to change in rate of tax and the payment has been made post change in rate of tax. Now, for payment of service tax under reverse/partial charge obligation, which rate of tax, has to be reckoned, whether 12.36% or 14%?

Response:

Since this is the case of a transaction between associate enterprises, the point of taxation for the same shall be guided by proviso to Rule 7 which states that the date of payment shall be the point of taxation. Since the payment has been made post change in rate of tax, the new rate of service tax has to be adopted for discharging obligation under reverse charge mechanism.

However, assuming that there is only a book adjustment in the books of accounts and the debit in the books of subsidiary company has been taken place before change in rate of tax, then service tax has to be paid at the old rate, since the point of taxation occurs at the time when debit is made in the accounts of the subsidiary company.

This article is contributed by Sri Harsha, Partner at SBS and Company LLP, Chartered Accountants. The author can be reached at harsha@sbsandco.com

CONTRACT LABOUR

THE ABC TO XYZ OF CONTRACT LABOUR

Contributed by Dr. R. Krishna Murthy & S V Ramachandra Rao

Engagement of contract labour by employers through agencies has always been an issue of great interest if not controversy. Contract Labour employed in the industry generally are not on the rolls of the company. In the Indian environment the issues pertaining to the engagement of Contract Labour have been a topic of great concern.

A Commission called the Gokhale Commission was set up in the year 1967, by the Government of India by its notification of July 4, 1967. It was mandated to study the question of job security in Private Oil Companies like Burmah Shell Oil Storage and Distribution Company of India, Burmah Shell Refineries Ltd., Bombay, Esso Standard Eastern Ltd. Esso Standard Refining Company of India Ltd., Bombay, Caltex (India) Ltd and Caltex Oil Refining (India) Ltd., Vishakhapatnam and also the study the question of Job Security.

The terms of reference of the Commission interalia were:

1. The number of surplus workmen if any on the rolls of companies like Burmah Shell, Esso and Caltex

2. The reasons and justification for the said workmen becoming or being rendered surplus and in particular, the extent to which they became surplus because of:

(a) The introduction and extension of contract or agency system in the said companies;
(b) The recruitment of casual labour by the company
(c) The changeover to bulk filling of oil products and the discontinuance of distribution of kerosene and other products in tins and barrels and closing down of the tin plants by the said companies;
(d) The rationalization and re-organisation of business and the working methods of the said companies;
(e) The introduction of automatic devices including accounting machines and computers by the said companies,
(f) Other measures

3. The methods, plans and schemes (including early voluntary retirement schemes and voluntary separation schemes, if any) adopted by the said companies to deal with the surplus workmen.

4. The manner in which the said the methods plans and schemes were formulated and implemented.

5. The extent to which the said methods, plans and schemes and their implementation was just, proper or in accordance with the law

6. If any of the methods plans and schemes adopted to determine and deal with the surplus workmen or the implementation thereof was not just, proper or in accordance with the law, the action in the opinion of the Commission, should be taken by the Government to ensure security of jobs and other relief to the workers concerned.

The terms of reference of the Commission and the issues led to the Contract Labour (Regulation and Abolition) Act, 1970 being enacted by Parliament to prevent exploitation of contract Labour. The Act empowered the Government to not only regulate the employment of contract labour, but also abolish it in certain circumstances. The Act envisaged the right to prohibit the employment of contract labour in

industry. Wherever this was not possible, it tried to improve the conditions of work of the contract labour through the regulatory mechanism that was available under the Act for licensing of contractors and registration of the Principal Employers. The globalization and liberalization polices pursued by the Government of India, post 1991 has resulted in transformation of the Indian Manufacturing exposing it to the global competition. It has also resulted in restructuring of the economy with privatization and progressive dismantling of the license regime that had earlier encouraged monopolies and prevented competition.

The Contract Labour Act, 1970 never envisaged the dynamic market driven environment and the tremendous challenges that the new technology driven economic activity has posed. Technological innovations along with greater product and technological obsolescence have meant that workforces need to be flexible and adaptable to the changed scenario. However, the Chapter VB provisions in manufacturing industries do pose a lot of challenges for managements and hence the engagement of Contract Labour has become substantial. The Government inspite of several promises to bring forth an exit formula and liberalization of the labour laws, failed to live to its promise. Given the fragile nature of the coalition government at the Centre and also in many states, there has been no change in the labour laws and nothing more is also expected during the last few days of this UPA II Government. Even the Government of India has admitted that the economic growth that has taken place has been a jobless growth, but the growth in the employment of contract labour has been significant and in many industries, now contract labour outnumber the permanent workforce many times over. It will be misleading to evaluate a factory on the basis of its permanent workforce. This may be miniscule. To get a real idea of the real numbers working you will have to add the contract labour, the trainees and outsourced employees engaged through agencies like Team Lease, Addecco, Sodexo or the like to the permanent employees on the rolls. Then alone, a true estimate of the actual workforce strength will emerge.

Corporate India has opted for flexibility through contract labour in a major way. In states like Maharashtra, there have been problems with the engagement of contract labour and the state has been quite activist in threatening prohibition of contract labour and then permitting it. This bureaucratic control is the remnants of the license raj and there is no way this will ever be discontinued for it involves a benefit for the bureaucracy as well as the employer to continue without any addition to the permanent liability. In states like Goa and Gujarat, the engagement of contract labour has become very easy and there are whole companies running entirely on contract labour without any permanent workers. The advantage of running the company on contract labour is the advantage of low costs, high flexibility of wanting to discontinue the operations at will and also the headaches of permanent workmen being avoided. There is added benefit of no trade union hassles, though lately; the workmen of contract labour are also becoming increasing unionized.

Maruti at Gurgaon showcased how operations centered on contract labour can go horribly wrong. In many cases, this can prove to be the Achilles heels for the organization and can catapult them into serious conflicts and confrontation. Just as contract labour is getting organized, the contractors are also becoming an organized group and a force to reckon with. In some of the places like Nagar, Ranjangaon, Khed, Shirwal, contractors with enormous political clouts and power have emerged on the scene and companies operating in the area are now in the control of this groups. They are very intimidating and will not allow business to happen unless they are awarded the contracts. They have a good hold over the bureaucracy as well as the police, because all this is done with the political clout the ruling party enjoys.

While in Maruti, the contractor's workmen refused to have any links with the internal union of the company, paid a heavy price for refusing to deal with the CPM affiliated union. Apart from paying 40 lakhs as a VRS to leaders of the Unions to exit from the employment as contract labour in the company, the subsequent violence leading to the death the AGM HR – Avanish Kumar and over 100 officers of the company being hit with iron rods and subsequent termination of over 547 contract labour for the violence epitomized the darkest blot on the Industrial Relations scenario of Gurgaon that has sent shock waves all over India.

The subsequent settlement with the permanent workmen at Maruti;, giving the permanent workers a hike of Rs.18,000 p.m has further distorted the wages between the contract labour and the permanent workers and apart from the conflicts getting more sharply differentiated, the workers in many of the ancillary units have also become disgruntled and creating problems for a host of other companies because of these developments.

While these problems may be daunting, a few companies have managed to show that with intelligent planning and thought process, many of the issues the plague the employment of contract labour can be effectively addressed. What are the issues?

Issue 1: Engaging contract labour for jobs of a perennial nature – Demand for permanency or the same wages as permanent workmen:

The issue of what is perennial and what is not has been a major issue, that has always dogged the judiciary and the demand that the contract labour should be made permanent is an issue that has come up before the judiciary many a time. The concept of "sham contract" and "lifting the veil" has emerged because of the dispute of using contract labour for doing work of a permanent nature. This is the most rampant misuse and abuse of contract labour. Though the contract labour Act, Rule 25(v)(a) provides the same wages to contract labour doing the same work the permanent workmen, in many companies, this is observed only in the breach.

Contract labour is paid the Minimum Wages, but certainly not the same wages as earned by the permanent workmen. It will be worthwhile having a look at the provisions of the Act to deal with this situation that is very common in the industry. The (Central and similar under the State Laws) says :
25 (2) Every licence granted under sub-rule (11) or renewed shall be subject to the following conditions, namely:

(1) the licence shall be non-transferable;

(2) the number of workman employee as contract labour in establishment shall not, on any day , exceed the maximum number specified in the license;

(3) save a provided in these rules, the fees paid for the grant, or as 'the case may be, for renewal of the license shall be non-refundable;

(4) the rates of wages payable to the workmen by the contractor shall not be less than the rates prescribed under the Minimum wages Act, 1948 (II of 1948), for such employment where applicable, and where the rates have been fixed by agreement, settlement or award, not less than the rates so fixed;

(5) (a) In case where the workmen employed by the contractor perform the same or similar kind of work as the workmen directly employed by the principal employer of the establishment, the wage rates, holidays, hours of work and other conditions of service of the workmen of the contractor shall be the same as applicable to the workmen directly employed by principle employer of the establishment on the same or similar kind of work. Provided that in the case of any disagreement with regard to the type of work the same shall be decided by the Chief Labour Commissioner (Central)

(b) in the other cases the wage rates, holidays, hours of work and conditions of service of the workmen of the contractor shall be such as may be specified in this behalf by Chief Commissioner (Central);

Explanation -- While determining the wage rates, holidays, hours of work other conditions of service under Cl.(b) above, the Chief Labour Commissioner shall have due regard to wage rates, holidays, hours of work other conditions of service obtaining in similar employments.

It is very clear that the law has the power to see that the contract labour working at the manufacturing site is not exploited by the employer. But in reality, what is provided in law is hardly enforced and there have been contract labour working on jobs of a perennial nature for several years and paid merely the Minimum Wages. This provides a fertile breeding ground for conflicts and some of the enlightened companies have got around this problem by providing in agreements better terms and conditions of service for the contract employees. Companies like Sobha Developers have understood the basic desire of any contract employee to work in a company rather than with a contractor and formed a separate outfit to take on its rolls the contract labour. Yet, the employees could not claim that they were employees could not claim that they were employees of the principal employer, yet enjoy all benefits of permanency, security of employment and assurance that they are not engaged by a fly by night operator. Companies like Hindustan Aeronautics have contractors, who offer employment to the employees with a very clear understanding that they would retire as employees of the contractor only and not get absorbed in HAL. But as contractors, their terms and conditions of service are far superior to what other contractors offer and this in turn is a better alternative for the contract employees, though falling short of their expectations. Similarly, companies like Thermax have signed settlements on behalf of the contract workmen with the regular union providing for reasonable wage hikes periodically and benefits. But they do not get the same wages as permanent workers. Some agreements, like in the case of Larsen & Toubro Ltd. Provide for outsourcing of the routine jobs and the company has welders and other skilled persons working in the company, but who will be paid as per the rates applicable. They are more than the Minimum Wages, but substantially lower than what the company pays its permanent staff. These are some ways by which companies have tried to meet the aspirations of the contract labour, yet be particular that the costs as well as flexibility is not endangered.

Issue 2: Coverage of contract Labour under PF/ESI:

For the principal Employer, this is a prime concern. The contractor may come and go, but the liability for the PF and ESI Contributions of the employees engaged by the contractor is the principal employer's headache. More so, when the contractor has done the job and left, the PF Inspector or the ESI Inspector visiting may raise a claim for the contribution and if it has not been done, then they will demand the employers contribution, the employee's contribution and penal interest on the same along with a penalty. And neither the contract employee nor the contractor will get any benefit out of this. It is purely a levy that benefits the corporation. More importantly, for any breach, the Directors of the company will

get the notices and this is best avoided. Hence companies take licensed contractors, who have their own code and ensure that this matter of coverage under the PF and ESI Act is taken care of. If the contractors is a small time operator and not having his own ESI or PF number.

In a few companies, the liability for PF and ESI contribution of the labour employed by the contractor is avoided by the company on the ground that the person concerned is performing a job contract. But where a person remains on the premises of the principal employer, it is the duty of the Principal Employer to ensure that the workmen working in the factory premises are covered for PF and ESI liability, failing which it will become his headache at best and nightmare at worst!

Issue 3: Better terms and conditions than the Minimum Wages:

Many contractors keep the workmen on the Minimum Wages (some pay less than the Minimum Wages, but on paper they will show that they pay the Minimum Wages). However, the contract labour seeks higher wages, particularly those who have worked in the same company for more than one year. Some companies come around this problem by asking the contractor to change the labour once in six months, so that the issues raised by the contract labour are nipped in the bud. But where the same person works in the company for more than 240 days and for several years, companies become vulnerable to claims of the contract labour or their unions and their demand to give them better terms and conditions of service. Paying persons with more years of service higher amounts is a way of resolving this issue. Ensuring that the contract labour gets their dues is the responsibility of the principle employer, particularly when they work more beyond their normal duty hours. The principal employer must ensure that contractor pays the contract labour double the wages for overtime (and not the single rate he pays for work done beyond 8 hours.)

Issue 4: Welfare and Amenities for the Contract Labour:

In many organizations, there is a difference in treatment meted out to the contract labour compared to the permanent workmen. Canteen may not be the same. Food may not be the same. Facilities given to the permanent workmen may not be available for them. This is because the employer of the contract labour is the contractor. This creates some heartburn amongst the contract labour. However, some companies have addressed this issue and many provide transport, lunch, snacks and tea on equal footing to the contract labour. When this is done, there is a substantial reduction in the heartburn and angst, experienced by the contract labour. Small things matter and companies that attend to the small things find that they enjoy harmony and prosperity and success in the big things that matter. Some companies provide transport, canteen and other amenities on the same footing to the contract workmen as provided for the permanent workmen. In a few companies, the contract workmen are also part of the annual social get together and this makes them feel that they are part of the same organizations, bonus paid to the permanent workmen is 20% gross salaries plus ex-gratia. But the contractor may not even pay the minimum bonus to the contract labour. This does create avoidable heartburns. Companies like Global Innova, a firm of contractors providingcontract labour builds viable colonies for its contract labour at the sites where they work and these colonies have swimming pools and other amenities like in any up-end housing colony. Employees working as contractors vie with each other to get such jobs, which give them a great them a great lifestyle.

Issue 5: Contractors Change, but employees remain the same:

In many contracts such as housekeeping, security, gardening, there is no need for the same set of persons to work and the contract being changed periodically is a very good way of not only ensuring that the service provided is in keeping with the best, but also a way of ensuring that no vested interests develop. But amongst employers, there has been a penchant for keeping the same persons, even if the contractor is changed or changing the names of the employees but keep the same person even under a different contractor. These are sharp practices and that can lead the company into a lot of difficulties. Employers prefer the same person as he is trained and conditioned and resent having to retrain and get involved all over again with a new set of employees. Old wine in new bottle is preferred and such practices create enormous difficulties for the organization. This is observed more on the shop floor, where skilled or semiskilled operations are required to be performed.

These are some of the topical issues that have emerged in the engagement of contract labour. Today in many organizations, the contract labour has become more significant and strategic than the regular labour. To expect that the contractor, who is interested in making money (The more the lebour employed, the more the merrier!!) will attend to the problems is only a fond hope. In practice, it is belied and the principal Employer will be landed up with the problems of the contractor. He must realize that unless innovative and practical steps are taken to resolve the issues and problems, they will become bigger headaches for the principle employer. The law and case laws in the engagement of contract labour has become more complex and the degrees of freedom and choice which employers enjoyed is being whittled down steadily and unless employers learn also how to manage the affairs governing the contract labour, it will become a major nightmare. It need not become as bad as in Maruti for employers to sit down and take notice. Yet it can be ignored only at your own peril and costs. The costs are becoming astounding both in money terms as well as taking an account on the life or life-expectancy f the people involved in the management of control labour!!

Problems of contract labour has become more strategic than the regular workmen whose number is becoming more and more miniscule compared to the contract labour being engaged, many on direct manufacturing activities. Attending to the above mentioned issues will save Manufacturing HR professionals many headaches and pre-empt problems and worries.

This article is contributed by Dr. R. Krishna Murthy & S V Ramachandra Rao, an Associate to SBS and Company LLP, Chartered Accountants. The author can be reached at svrr@resourceinputs.com

TECHNICAL SESSIONS:

S.No.	Event	Date	Speaker	Venue
1	Service tax vis-à-vis SEZ	8 May 2015	CA Sri Harsha	SBS - Hyd
2	Recent amendments of Rules, under Companies Act, 2013	15 May 2015	CS Phanindra DVK	SBS - Hyd
3	Technology Impact on Chartered Accountants	22 May 2015	CA Saran Kumar U & Mr. Jay Gopal T	SBS - Hyd
4	Overview on CARO-2015	29 May 2015	CA Vasanth	SBS - Hyd

Overview on Dormant company - Companies Act - CS Phanindra DVK

Complete overview on Individual Income tax return - CA Suresh Babu S

Budget Meet 2015

Budget Meet 2015

CONFERENCE ORGANISED BY RESOURCE INPUTS LTD., SBS AND COMPANY LLP & BIGSTAY

Date : 20th May 2015 Fee : No Delegate Fee

Venue : Kothari Seminar Hall, IFMR, Sricity Tada Topics : Read Below

Make in India – Labour Laws – Game changer			
S No.	**Topic**	**Timings**	**Speaker**
9:30 am - 10:00 am	**Registration**		
Inaugural & Interactive Session 10:00 am - 11:00 am	Chief Guest	Shri. G. Bala Kishore - Director of Factories - Govt. of AP	
1	Special address by Bigsun	11:00 - 11:15	Mr.Jagadeesh (CEO, Bigsun)
2	Tea Break	11:15 - 11:30	Tea Break
3	Labour Law reforms in the context of 'Make in India'	11:30 - 13:00	Prof. Dr. E M Rao - XLRI & XIMB
4	Lunch Break	13:00 - 14:00	Lunch Break
5	Transformational Leadership	14:00 - 14:45	Prof. S Raghu Raman – IFMR
6	Personal Taxation & Online filing of Income Tax Returns (Individuals)	14:45 - 15:30	CA Ramprasad & CA Saran Kumar U (Partners SBS and Company LLP)
7	Tea Break	15:30 - 15:45	Tea Break
8	Recent amendments to Labour Laws in AP & Proposed Labour Laws	15:45 - 16:30	Mr. S V Ramachandra Rao & Mr. R Durga Prasad

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