CORPORATE UPDATE

DIRECT TAX

INTERNATIONAL TAXATION

I. Domain name registration charges are liable to tax in India as Royalty

M/s Godaddy.com LLC v. ACIT
(ITA No. 1878/Del/2017)

Recently, the Tax Tribunal, Delhi Bench has held that domain registration fee received by a non - resident from Indian customers is subject to tax in India as royalty in terms of section 9(1)(vi) of the Act.

The taxpayer is a limited liability company located in USA however is not a tax resident of USA and therefore not eligible for treaty benefits. It is authorized as domain name registrar by the relevant authorities and is engaged in the business of web hosting services and domain name registration. While filing the return of income in India, web hosting service fee was offered to tax as royalty while domain registration fee was claimed as non taxable in India. However, the tax officer treated the domain registration fee also as royalty on the premise that web hosting services and domain name registration are interrelated processes. Even otherwise the tax officer held that domain name is an intangible asset similar to trade mark. This view of the tax officer was upheld by the Dispute Resolution Panel (DRP). Thereafter, the tax payer preferred an appeal before the Tax Tribunal.

The Tax Tribunal, while considering the facts of the case relied upon the decision of Hon'ble Supreme Court of India in the case of Satyam Infoway Ltd. Vs. Siffynet Solutions Pvt.Ltd. [2004] Supp (2) SCR 465 (SC) which dealt with the issue whether internet domain names are subject to the legal norms applicable to other intellectual properties such as trademarks. The Hon'ble Apex Court held that the domain name is a valuable commercial right and it has all the characteristics of a trademark and accordingly, it was held that the domain names are subject to legal norms applicable to trademark.

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In view of the aforementioned decision of the Apex Court, the Tax Tribunal held that the rendering of services for domain registration ought to be considered in connection with the use of an intangible property which is similar to trademark. Therefore, the charges received by the assessee for services rendered in respect of domain name was held to be royalty within the meaning of Clause (vi) read with Clause (iii) of Explanation 2 to Section 9(1) of Income-tax Act.

II. Key takeaways from Double Taxation Avoidance Agreement (DTAA) between India and Hong Kong

Press Release dated 19 March, 2018

Vide Press Release dated 10 November 2017 it was announced that India and Hong Kong will enter into a DTAA. On 19 March 2018, the two countries signed a comprehensive DTAA that seeks to improve transparency in tax matters and help curb tax evasion / avoidance. The key highlights of the DTAA are as under:

- Besides other clauses for constitution of PE, threshold for constitution of installation PE is 'More than six months' and for service PE is 'exceeding 183 days in any twelve months period';
- Dividend income earned by the resident of Hong Kong, from an Indian Company, shall be liable for taxation in India and the tax rate shall not exceed 5% provided 'beneficial ownership test' and 'main purpose test' are satisfied;
- Capital Gains arising to a resident of Hong Kong, from alienation of shares of an Indian company or other Indian securities will be chargeable to tax in India;
- Interest income, Royalties and Fee for Technical services earned by a resident of Hong Kong, from India, shall be liable to tax @ 10% subject to the satisfaction of beneficial ownership test and main purpose test;
- Short stay exemption is available for the personnel exercising employment in India provided the period of stay of such personnel does not exceed 183 days in any twelve months period;
- The DTAA also contain the provisions relating to exchange of information between the two countries;

The DTAA between the two countries shall be effective on the date of the later of the notification by each of the countries, that the procedures required by its law for entry into force of this DTAA has been completed.

(Contributed by: Mr. Anuj Mathur/ Ms. Purnima Bajaj)

TRANSFER PRICING

I. Central Board of Direct Taxes achieves important milestone of 200 Advance Pricing Agreements, also concludes Advance Pricing Agreement accepting Customs Valuation as Arm's Length Price

With Central Board of Direct Taxes (CBDT) entering into 7 more unilateral Advance Pricing Agreements (APAs) in February 2018, it has crossed the important milestone of having signed 200 APAs. APA provisions introduced by the Income Tax Act, 1961 in 2012 provide certainty to taxpayers in the domain of transfer pricing by specifying the method of pricing & setting the prices of international transactions in advance.

In March 2018, CBDT also concluded an APA where the price determined by Special Valuation Branch of Customs Authorities has been accepted as Arm's Length Price for import transaction. This is a welcome step as Transfer Pricing and Customs Valuation have always been operating opposite to each other due to their respective objectives.

(Contributed by: Ms. Ritu Theraja)

DOMESTIC TAXATION

I. Supreme Court upholds disallowance under section 14A on strategic investments

(Supreme Court – Maxopp Investment Limited –Vs. CIT – (2018) 91 taxmann.com (SC))

In a recent decision, the Supreme court of India, in a batch of appeals, while upholding the decision of High Court of Delhi has held that section 14A of the Income-tax Act is applicable on strategic investments. Furthermore, the dominant purpose for which the investment is made may not be of any relevance.

The Apex Court observed that as long as there is an exempt income which is earned, expenditure incurred which is attributable to earning such income, has to be disallowed under section 14A of the Act.

In the instant case, the taxpayer was engaged, inter alia, in the business of finance, investment and was dealing in shares and securities. The appellant held shares/securities in two portfolios, viz. (a) as investment on capital account; and, (b) as trading assets for the purpose of acquiring and retaining control over investee group companies, particularly Max India Ltd. Any profit/loss arising on sale of shares/securities held as 'investment' was reported as income under the head 'capital gains', whereas profit/loss arising on sale of shares/securities held as 'trading assets' (i.e. held, inter alia, with the intention of acquiring, exercising and retaining control over investee group companies) was regularly offered and assessed to tax as business income. Considering that such earning of dividend was incidental to the holding of shares, no disallowance was made under Section 14A of the Act of the interest expenditure relatable to the investment which was debited to the profit and loss account.

The Appellant, while consistently following the aforesaid treatment filed the tax return for A.Y. 2002-03.However, Assessing Officer (AO) rejected the claim of the appellant and made disallowance of proportionate expenditure under Section 14A of the Act. CIT(A) also upheld the order of AO.

On Further appeal, the Special bench of Delhi Tribunal (SB) together with Assessee's appeal in the case of Daga Capital Management (Pvt) Ltd (312 ITR AT 1), held that investments representing controlling interest were on capital account and accordingly, section 14A was applicable as such investments did not amount to carrying on of business.

The HC of Delhiwhile upholding this view, held that the expression 'in relation to', as appearing in section 14A means 'in connection' with or 'pertaining to'. Hence, the section would apply regardless of the intention/motive behind the investment.

In another decision in the case of PCIT v. State Bank of Patiala [(2017) 391 ITR 218 (P & H)], the Punjab and Haryana High Court had taken a divergent view and deleted the disallowance under section 14A by holding that the purpose of purchase of shares was not to earn exempt dividend income but to earn trading profits as the assessee was engaged in the purchase and sale of shares as a trader with a view to earn profit rather than on intent to earn interest or dividend. It was further held that the tax free income was only incidental to the assessee's main business and therefore, no expenditure had been incurred for earning exempt income.HC also relied on the notification no. 18, dated 02-11-2015 issued by CBDT for the banking institutions, which carves out a distinction between stock-in-trade and investment. The said notification provides that if the motive behind the purchase and sale of shares is to earn profit then the same would be treated as trading profit and if the object is to derive income by way of dividend, then the profit would be said to have accrued from the investment.

In view of the conflicting decisions of two High Courts, the matter travelled to the Supreme Court.

The Apex court, although concurring with the Punjab and Haryana High Court decision with regard to the distinction between stock in trade and investment, rejected the dominant purpose test theory to trigger the disallowance under section 14A. The Supreme Court affirmed the view taken by Delhi High Court and held that if dividend income received is exempt, then the disallowance is triggered in all cases and such expenditure cannot be allowed as a business expenditure keeping in view the objective for which section 14A was inserted into the Act.

With this decision, the controversy pertaining to the applicability of section 14A on the basis of dominant purpose test has been put to an end.

(Contributed by: Ms. Ritu Gyamlani)

II. Amendments to the Finance Bill, 2018

The Union Budget 2018 was announced on February 1, 2018, which included numerous direct tax and indirect tax proposals. The Finance Bill, 2018 was tabled in Lok Sabha, wherein 18 amendments were moved. The Bill was subsequently enacted and received Presidential assent on March 29, 2018.

The notable amendments to 'Finance Bill' 2018 have been mentioned below:

1. <u>Concept of Significant Economic Presence (SEP)</u>

   The Concept of Significant Economic Presence (SEP) was introduced in Section 9(1) of the Income-tax, Act 1961 ('the Act') for constituting business connection in India. It was also provided that SEP shall be constituted regardless of whether a non-resident has a residence or place of business in India or the non-resident renders services in India.

   It has now been provided that a business connection shall be constituted in India irrespective of the place where the agreement is entered.

2. <u>Capital Gain on sale of equity shares & equity oriented funds</u>

   Section 112A was proposed to be inserted by Finance bill 2018,to stipulate the provisions dealing with the taxability of long term capital gains(LTCG)arising from transfer of equity shares and equity oriented mutual funds on which STT is paid. In the section 112A as it stood in the Finance Bill 2018, an ambiguity arose in relation to the taxability of such LTCG upto INR 0.1 million. It has now been specifically provided that LTCG upto INR 0.1 million will not be taxable.

3. <u>Amendment in CBcR Reporting Requirements</u>

   Section 286 has been amended to provide that time limit for furnishing CBCR by an Indian entity is to be 'prescribed'. Earlier the stipulated period was 12 months from the end of reporting accounting year. The aforesaid amendment shall provide flexibility to Indian tax payers to comply with CBCR provisions.

4. <u>Requirement of obtaining PAN by foreign companies for certain financial transactions</u>

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Under the provisions of the Finance Bill,2018, it was proposed that obtaining a PAN would be mandatory if any entity (other than individual) enters into a financial transaction exceeding INR 0.25 million. The said provision, as proposed was applicable even to Non-Resident entities.

The aforesaid proposal has now been amended to exclude 'Non Residents' entities and as such, such Non-Resident entities would not be required to obtain a PAN merely on account of entering into financial transactions exceeding INR 0.25 million during a financial year.

(Contributed by: Ms. Ritu Gyamlani)

INDIRECT TAX

GOODS AND SERVICES TAX (GST)

E-Way Bill under GST law

Electronic Way Bill (E-Way Bill) is a document required to be carried by a person in charge of the conveyance carrying any consignment of goods of value exceeding fifty thousand rupees in terms of section 68 of Goods and Services Tax (GST) Act read with rule 138 of the Central Goods and Services Tax (CGST) Rules, 2017 framed there under.

E-way bill is introduced to track movement of goods and ensure payment of taxes in relation thereto, wherever applicable.

Vide Notification No. 15/2018 – Central Tax dated 23rd March, 2018, e-way bill for inter-state movement of goods has been made mandatory w.e.f. 1st April, 2018. Further, as recommended in the 26th GST Council Meeting (held on 10th March 2018), e-way bill system for intra-state movement of goods, will be introduced w.e.f. a date to be announced in a phased manner but not later than 01st June, 2018. As on date, E-way bill for Intra-state movement of goods has been made effective in 17 States.

On the basis the revised E-way bill rules (notified vide Notification No.12/2018 – Central Tax dated 7th March 2018), recommendations made in 26th GST Council meeting and Press Releases issued by the Government w.r.t. GST e-way bill, we have prepared a brief questionnaire which is reproduced below:

Q.1 What is the incidence for generation of e-way bill?

A.1 E-way bill is required to be generated where movement of goods is

(i) In relation to a supply; or
(ii) For reasons other than supply (like goods send on job-work basis, etc.); or
(iii) Due to inward supply from an unregistered person

In brief, e-way bill is required to be generated for all movement of goods (of consignment value exceeding INR 50,000/-). However, there are certain exceptions to this rule, as prescribed under Rule 138(14) [discussed later in detail].

Q.2 Who can generate e-way bill?

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A.2 E-way bill is required to be generated by the person who causes movement of goods. Accordingly, the following persons may generate e-way bill:

(i) Consignor of goods;
(ii) Consignee of goods;
(iii) Transporter of goods (applicable only in case of transport of goods by road);

Further, an unregistered person or unregistered transporter can also enroll himself on the common portal and generate e-way bill for movement of goods.

Accordingly, please find below the table reflecting the person who would be required to generate e-way bill under difference scenarios:

Scenario	Consignor/ Supplier	Consignee/ Recipient	Person required to generate e-waybill
i)	Registered	Registered	Person who causes movement of goods
ii)	Unregistered	Registered	Registered Recipient
iii)	Registered	Unregistered	Registered Supplier However, unregistered recipient, enrolled on the website, may also generate e-way bill in this case
iv)	Unregistered	Unregistered	Enrolled Transporter or unregistered supplier or unregistered recipient

Q.3 Which website is used for generation of e-way bill?

A.3 The website for generation of e-way bill is https://ewaybillgst.gov.in

Q.4 Whether e-way bill is required for intra-state movement of goods?

A.4 As on date (May 3, 2018), GST e-way bill for intra-state movement of goods has been made effective in 17 States from different appointed dates as under:

- From April 1, 2018: Karnataka
- From April 15, 2018: Telangana, Andhra Pradesh, Uttar Pradesh, Kerala and Gujarat
- From April 20, 2018: Bihar, Himachal Pradesh, Haryana, Jharkhand, Tripura and Uttarakhand
- From April 25, 2018: Arunachal Pradesh, Madhya Pradesh, Meghalaya, Sikkim and Puducherry

Q.5 What is the meaning of the term 'consignment value' to determine the threshold of INR 50,000/-?

A.5 The term "consignment value" is the value as mentioned on the invoice or bill of supply or delivery challan, as the case may be, including the applicable tax thereon and shall exclude the value of exempt supply of goods where the invoice is issued in respect of both exempt and taxable supply of goods.

Basis above definition, one may note that the consignment value would be determined on invoice level basis. In case of multiple invoices, each invoice would be treated as a separate consignment for e-way bill purposes.

Q.6 Whether e-waybill can be generated even if 'consignment value' is less than the threshold limit of INR 50,000/-?

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A.6 E-way bill may be generated voluntarily, even if the value of the consignment is less than fifty thousand rupees.

Q.7 What is the format of E-Way Bill?

A.7 E-Way Bill is required to be generated in Form GST EWB-01 which comprises of two parts as under:

- Part-A: Captures basic information of the consignor, consignee and the goods sought to be transported as under:

  A.1 GSTIN of Supplier (if not registered, then the letters "URP" are to be filled)
  A.2 Place of Dispatch (Pin code)
  A.3 GSTIN of Recipient (if not registered, then the letters "URP" are to be filled)
  A.4 Place of Delivery (Pin code)
  A.5 Document Number (like Tax Invoice, Bill of Supply, Delivery Challan or Bill of Entry)
  A.6 Document Date
  A.7 Value of Goods
  A.8 HSN Code
  A.9 Reason for Transportation (like supply, export or import, job work, sales returns, for own use, others, etc. has to be chosen from the 10 options available on the Portal).

- Part-B: Captures the detail of vehicle used for transportation of goods.

  B.1 Vehicle Number for Road Transportation
  B.2 Transport Document Number (like Goods Receipt Number or Railway Receipt Number or Forwarding Note number or Parcel way bill number issued by railways or Airway Bill Number or Bill of Lading Number)

Please note that a unique number (i.e. e-way bill number) would be generated after furnishing information in Part-A of the e-way bill. However, the e-way bill shall not be valid for movement of goods by road unless the information in Part-B of FORM GST EWB-01 has been furnished.

Further, furnishing of information in Part-B is not mandatory in case of movement of goods from the place of consignor to the place of transporter for further transportation or from the place of transporter to consignee's place of delivery, if such movement is within the State or Union territory and the distance is upto 50 km.

Q.8 Whether e-way bill is required for transportation of goods from the place of Consignor (like factory or warehouse) to the place of Transporter or from the place of Transporter to the place of Consignee?

A.8 If the distance between the place of business of Consignor and place of Transporter is upto 50 km within the same State/ Union Territory, then in such cases information in Part A of e-way bill is required to be furnished for movement of goods from Consignor's place of business to Transporter's place. Part-B (i.e. Conveyance details) of E-way bill may be furnished later by the Transporter, when movement of goods actually starts from the place of Transporter.

Similarly, if distance between the place of Transporter and the place of business of Consignee is upto 50 km within the same State/ Union Territory, then Part-B of e-way bill is not required to be updated and the original e-way bill (generated at the time commencement of movement of goods) would be valid for movement of goods from the Transporter's place to Consignee's place for delivery of such goods.

In all cases other than above, Part-B of e-way bill is mandatory required to be furnished/ updated for every movement of goods.

Q.9 Whether e-way bill is required for transportation of goods only by road?

A.9 E-way bill is required to be generated for transportation of goods by all modes of transportation i.e., road, air, vessel and railways.

Further e-way bill is also required to be generated for transportation of goods whether by own conveyance, public conveyance or hired one. The responsibility of generating e-way bill in case of movement of goods by public transport would be of the consignor or consignee who causes movement of goods.

Q.10 Whether it is mandatory to generate e-way bill before commencement of movement of goods?

A.10 Yes. E-way bill is required to be generated before commencement of movement of goods. However, in case of transportation of goods by air, vessel or railways, Part-B (conveyance details) of e-waybill may be furnished before or after the commencement of movement of goods.

Further, it has been prescribed that that the railways would not deliver the goods unless the e-way bill is produced at the time of delivery of goods

Q.11 Who is liable for generation of e-way bill in case of transportation of goods through an e-commerce operator or a courier agency?

A.11 In case of transportation of goods through an e-commerce operator or courier agency, on an authorization received from the consignor, e-way bill may be generated by such e-commerce operator or courier agency. In such cases, the information in Part A of the e-way bill may be furnished by such e-commerce operator or courier agency (on an authorization received from the consignor) and unique e-way bill number would be generated on the portal.

Q.12 How e-way bill would be generated in case of movement of goods on job-work basis?

A.12 In case of movement of goods on account of job- work, either the principal or the registered job worker can generate e-way bill. Further, where the movement of such goods is from one State/Union Territory (UT) to another State/ UT, then e-way bill is mandatorily required to be generated irrespective of the value of the consignment.

Q.13 How movement of goods on 'bill-to-ship-to' basis would be handled?

A.13 In case of "bill to and ship to" transaction, there are 3 parties involved as follows:

- 'A' is the person who has ordered 'B' to send goods directly to 'C'
- 'B' is the person who is sending goods directly to 'C' on behalf of 'A'.
- 'C' is the recipient of goods

In this complete scenario two supplies are involved and accordingly two tax invoices are required to be issued as under:

- Invoice -1, which would be issued by 'B' to 'A'
- Invoice -2 which would be issued by 'A' to 'C'

It has been clarified by the Government that only one e-Way Bill is required to be generated in case of "bill to and ship to" transactions. Following alternatives are available for generating e-way bill in such cases:

Case-1: Where e-Way Bill is generated by 'B', the following fields shall be filled in Part A of GST FORM EWB-01

1.	Bill From:	In this field details of 'B' are supposed to be filled
2.	Dispatch From:	This is the place from where goods are actually dispatched. It may be the principal or additional place of business of 'B'
3.	Bill To:	In this field details of 'A' are supposed to be filled.
4.	Ship to:	In this field address of 'C' is supposed to be filled.
5.	Invoice Details:	Details of Invoice-1 are supposed to be filled

Case-2: Where e-Way Bill is generated by 'A', the following fields shall be filled in Part A of GST FORM EWB-01

1.	Bill From:	In this field details of 'A' are supposed to be filled
2.	Dispatch From:	This is the place from where goods are actually dispatched. It may be the principal or additional place of business of 'B'
3.	Bill To:	In this field details of 'C' are supposed to be filled.
4.	Ship to:	In this field address of 'C' is supposed to be filled.
5.	Invoice Details:	Details of Invoice-2 are supposed to be filled

Q.14 What would be the consequences if, during movement, goods are transferred from one conveyance to another?

A.14 In case of transfer of goods from one conveyance to another during movement, the consigner or the recipient who has provided information in Part A of the FORM GST EWB-01 or the transporter shall, before such transfer and further movement of goods, update the details of conveyance in the e-waybill on the common portal in Part B of FORM GST EWB-01.

Q.15 Whether Transporters are mandatorily required to enroll (registered) himself on GST e-waybill website?

A.15 Yes. The Transporter should either have a valid GSTIN or he should enroll himself on GST e-waybill since as per Rule 138(6), where multiple consignments are to be transported in one conveyance, then the transporter would be required to indicate the serial number of e-way bills generated in respect of each such consignment electronically on the common portal and a consolidated e-way bill in FORM GST EWB-02 shall have to be generated prior to the movement of goods. In the absence of a valid GSTIN or registration on GST e-way bill website, transporter would not able to generate consolidated e-way bill in FORM GST EWB-02.

Q.16 Whether e-waybill is required to be generated if the aggregate value of the multiple consignment of goods carried in the conveyance is more than INR 50,000/-, however value of each individual consignment is less than INR 50,000/-

A.16 As per Rule 138(7) of CGST Rules, 2017, in case of interstate movement of goods, where the consignor or consignee has not generated e-way bill (considering that the value of each individual consignment is less than INR 50,000/-) and the aggregate value of multiple consignment of goods carried in the conveyance is more than INR 50,000/-, then the transporter shall generate the e-way bill in FORM GST EWB-01 on the basis of invoice or bill of supply or delivery challan, as the case may be, and may also generate a consolidated e-way bill in FORM GST EWB-02 prior to the movement of goods.

However, provisions of sub-rule (7) has not been notified yet. Accordingly, no e-waybill would be required to be generated by the transporter where individual value of consignments is less than INR 50,000/-.

Q.17 What is the validity period of an e-way bill?

A.17 The validity period for an e-way bill is as follow:

S. No	Distance	Validity Period
1.	Up to 100 km	One day in cases other than Over Dimensional Cargo
2.	For every 100 km or part thereof thereafter	One additional day in cases other than Over Dimensional Cargo1
3.	Up to 20 km	One day in case of Over Dimensional Cargo
4.	For every 20 km or part thereof thereafter	One additional day in case of Over Dimensional Cargo

One day shall be counted as the period expiring at midnight of the day immediately following the date of generation e-way bill.

For instance, if e-waybill is generated at 10.00 hrs on 1st April 2018, then the limit of one day would expire on midnight of 2nd April 2018 (i.e. midnight of the day immediately following the date of generation e-way bill).

Further, the unique number generated after furnishing of information in Part-A of the e-waybill shall be valid for a period of fifteen days for updation of Part B of FORM GST EWB-01.

Q.18 Whether the validity period of e-way bill can be extended?

A.18 If the goods cannot be transported within the validity period of the e-way bill due to certain exceptional circumstances including cases of trans-shipment, then it has been provided under law that the transporter may extend the validity period after updating the details in Part-B of e-way bill.

Q.19 What is the time limit for the supplier or recipient to communicate his acceptance or rejection of the e-waybill?

A.19 Time period for the supplier or recipient to communicate his acceptance or rejection of the e-waybill is 72 hours from the date of generation of e-way bill or time of delivery of goods,

[1] "Over Dimensional Cargo" shall mean a cargo carried as a single indivisible unit and which exceeds the dimensional limits prescribed in rule 93 of the Central Motor Vehicle Rules, 1989, made under the Motor Vehicles Act, 1988 (59 of 1988)

whichever is earlier. In case, acceptance or rejection is not communicated within 72 hours, it would be deemed as accepted.

Q.20 Whether an e-way bill can be cancelled?

A.20 Where an e-way bill has been generated, but goods are either not transported or are not transported as per the details furnished in e-way bill, then e-way bill may be cancelled within 24 hours of generation of the e-way bill.

Q.21 Whether the date of e-way bill and date of Tax Invoice should be same?

A.21 E-Way bill date is the date on which the e-way bill is generated. It can be different from the Tax Invoice date.

Q.22 Is there any exemption from requirement of generation of e-way bill under the GST law?

A.22 E-waybill is not required in the following cases:-

- Transportation of following goods:
    - Liquefied petroleum gas for supply to household and non-domestic exempted category (NDEC) customers,
    - kerosene oil sold under PDS,
    - Postal baggage transported by Department of Post,
    - Natural or cultured pearls and precious or semi-precious stones; precious metals and metals clad with precious metal (Chapter 71),
    - Jewellery, goldsmiths' and silversmiths' wares and other articles (Chapter 71),
    - Currency,
    - Used personal and household effects,
    - Coral unworked (0508) and worked coral (9601)

- Where the goods are transported by a non-motorised conveyance;

- Where goods are transported from port /airport / air cargo complex / land customs station to inland container depot / container freight station for customs clearance;

- In respect of movement of goods within such areas as are notified under clause (d) of sub-rule (14) of rule 138 of the Goods and Service Tax Rules of the concerned States;

- Exempted Goods, other than de-oiled cake;

- Where the goods being transported are alcoholic liquor for human consumption, petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas or aviation turbine fuel;

- Where the goods being transported are treated as no supply under Schedule III of the Act;

- Where the goods are being transported—

    (i) under customs bond from an inland container depot or a container freight station to a customs port, airport, air cargo complex and land customs station, or from one customs station or customs port to another customs station or customs port, or
    (ii) under customs supervision or under customs seal;

- Where the goods being transported are transit cargo from or to Nepal or Bhutan;
- Supply of goods by the CSD to the Unit Run Canteens;
- Supply of goods by the CSD to the authorized customers;
- Supply of goods by the Unit Run Canteens to the authorized customers;
- Supply of heavy water and nuclear fuels falling in Chapter 28 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) by the Department of Atomic Energy to the Nuclear Power Corporation of India Ltd;
- Where the consignor of goods is the Central Government, Government of any State or a local authority for transport of goods by rail;
- Where empty cargo containers are being transported; and
- Where the goods are being transported upto a distance of twenty kilometres from the place of the business of the consignor to a weighbridge for weighment or from the weighbridge back to the place of the business of the said consignor subject to the condition that the movement of goods is accompanied by a delivery challan.

Q.23 Whether e-way bill is required to be generated when goods are supplied by a service provider to its customer for providing services of right to use of such goods?

A.23 Yes, the service provider would be required to issue delivery challan and shall also generate e-way bill for inter-state movement of goods from service provider's place of business to the customer's place of business.

Q.24 Whether e-way bill is required to be generated in case of movement of samples or goods sent on approval, warranty products etc.

A.24 As per clause (ii) of Rule 138(1), e-way bill is required for movement of goods, where transportation is for reasons other than supply. Accordingly, e-way bill would be required to be generated for inter-state movement of samples, goods sent on approval, warranty products etc., if consignment value of such goods is more than INR 50,000/-.

Q.25 Whether e-way bill is required to be generated in case of barter transactions involving movement of goods?

A.25 Under GST law, even barter transactions qualify as 'supply'. Accordingly, e-waybill would be required to be generated in case of barter transactions involving movement of goods if consignment value of such goods exceeds INR 50,000/-.

Q.26 How would e-way bill be generated in case goods are transported in multiple vehicles in semi-knocked down or completely knocked down condition (like in case of plant & machinery)?

A.26 There may be a case where goods like plant & machinery are transported in multiple vehicles (i.e. multiple consignments) in a semi-knocked down or completely knocked down condition and a single Tax invoice is raised towards supply of such goods.

In such case, the supplier shall issue complete invoice before dispatch of the first consignment. Then a separate delivery challan would be issued for each consignment, giving reference of the Tax Invoice and separate e-way bill would be generated for each consignment basis the delivery challan details.

Each consignment shall be accompanied by copies of the corresponding delivery challan along with a duly certified copy of the invoice and the original copy of the invoice shall be sent along with the last consignment. Further, in the absence of any clarification regarding the value to be reflected on each Delivery Challan / E-waybill, it is advisable that the consignment value should be bifurcated, on some reasonable basis, for the purpose of disclosing the same on each Delivery Challan and E-waybill.

Q.27 How would e-way bill be generated in case of import of goods?

A.27 In case of import of goods there can be following two situations:

a) Movement of imported goods from Customs Station (port or airport) to the Importer's place of business: In this case, the importer would be required to generate e-way bill and shall mention 'URP' (unregistered person) under the head 'GSTIN of Supplier' and Pin code of the port/airport from where the goods are to be transported to the importer's place of business. Further, details of Bill of Entry would be required to be furnished in the e-waybill. Thus, movement of goods would be made under the cover of Bill of Entry and the e-way bill so generated by the importer or by the Transporter (upon authorization by importer).

b) Movement of imported goods from Customs Station (port or airport) directly to the Customer's place of business: There may be a case, where the importer may supply goods directly to its customer's premises from the port/airport after customs clearances instead of bringing goods to his location (importer's place of business). In such case, e-waybill may be generated by the registered importer or registered recipient (as the case may be) and Pin code of the port/airport (from where the goods are to be transported) shall be mentioned under the head 'Place of Dispatch'.

Q.28 How would e-way bill system work in case of movement of goods involving multiple modes of transport (For instance in case of movement of goods through railways wherein goods are first required to be brought to railway station by road and then transported by railways. Lastly such goods are transported to consignee's place from railways via road)?

A.28 As per e-way bill provisions, facility to update vehicle no. in the e-way bill is envisaged under the law. Accordingly, Part-B of e-way bill would be required to be updated whenever there is change in conveyance during the course of transportation of goods. In other words, e-way bill would be generated initially by giving the details of vehicle carrying the goods by road. Once the goods are unloaded from road and loaded in the train, then Part-B of e-way bill needs to be updated. Upon final movement of goods from railways to consignee's place, Part-B of e-way bill would again be required to be updated with the truck details carrying the goods for final delivery.

(Contributed by: Mr. Shashank Goel)

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FOREIGN EXCHANGE MANAGEMENT ACT

I. Foreign Exchange Management (Cross Border Merger) Regulations, 2018

The Ministry of Corporate Affairs had notified Section 234 of the Companies Act, 2013 with effect from 13 April 2017 facilitating cross border merger/amalgamation/arrangement between Indian and foreign companies. In April 2017, the Reserve Bank of India (RBI) had issued draft regulations for cross border merger regulations inviting comments from stakeholders.

Now RBI vide its notification no. FEMA.389/2018-RB, dated 20 March 2018, has notified the Foreign Exchange Management (Cross Border Merger) Regulations, 2018, salient features of which are mentioned below :-

1. **Key definitions:**

The key definitions under the Regulations are as given hereunder:

i. 'Cross border merger' means any merger, amalgamation or arrangement between an Indian company and foreign company in accordance with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 ("the Rules") notified under the Companies Act, 2013.

ii. 'Foreign company' means any company or body corporate incorporated outside India whether having a place of business in India or not. For the purpose of outbound mergers, foreign company should be incorporated in a specified jurisdiction under the Rules.

iii. 'Inbound merger' means a cross border merger where the resultant company is an Indian company.

iv. 'Indian company' means a company incorporated under the Companies Act, 2013 or under any previous company law.

v. 'Outbound merger' means a cross border merger where the resultant company is a foreign company.

vi. 'Resultant Company' means an Indian company or a foreign company, which takes over the assets and liabilities of the companies involved in the cross border merger.

2. In terms of Regulation 3 of the aforesaid Regulations, no person resident in India is permitted to acquire or transfer any security or debt or asset outside India and no person resident outside India is permitted to acquire or transfer any security or debt or asset in India on account of cross border mergers save as otherwise provided in the Foreign Exchange Management Act, 1999 or rules or regulations framed thereunder or with the general or special permission of Reserve Bank.

   All Cross Border Mergers pending before the competent authority as on date of commencement of these Regulations shall be governed by these Regulations.

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3. **Provisions on Inbound Merger in terms of Regulations 4:**

a) the issue or transfer of security by the resultant company to a person resident outside India is required to be in accordance with pricing guidelines, entry routes, sectoral caps, reporting conditions etc. as laid down in Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017, provided that:

   - Merger of foreign Joint Venture (JV) / wholly-owned subsidiary (WOS) with an Indian company is required to be compliant with conditions prescribed for transfer of shares of such JV / WOS under Foreign Exchange Management (Transfer or issue of any foreign security) Regulations, 2004;
   - Acquisition of step down subsidiary on merger of foreign JV/WOS by resultant company should be in compliance with Regulation 6 and 7 of Foreign Exchange Management (Transfer or issue of any foreign security) Regulations, 2004.

b) An office of the foreign company outside India shall be deemed to be a branch / office outside India of the resultant company in accordance with the Foreign Exchange Management (Foreign Currency Account by a person resident in India) Regulations, 2015.

c) Any guarantee/borrowing of the foreign company from overseas sources which stands vested in the Resultant Company is required to conform to the External Commercial Borrowing (ECB) norms and other applicable norms within a period of two years, provided that:

   - No repayment of liability shall be permissible from India within two years
   - No conditions with respect to end use shall apply

d) The resultant company may acquire, hold and transfer any asset outside India for which an Indian company is permitted under the provisions of Foreign Exchange Management Act, 1999 or the rules or regulations framed thereunder.

e) If the asset or security is not permitted to be acquired or held by the resultant company, the resultant company is required to dispose such asset or security within a period of two years from the date of sanction of the Scheme and repatriate sale proceeds to India through banking channels. Similarly, where any liability outside India is not permitted to be held by resultant company, the same is required to be extinguished from the sale proceeds of such overseas assets within a period of two years.

f) The resultant company is permitted to open a bank account in foreign currency in the overseas jurisdiction for transactions incidental to the cross border merger for a maximum period of two years from the date of sanction of the Scheme.

4. **Provisions on Outbound Merger in terms of Regulation 5:**

a) Any person resident in India may acquire or hold securities of the resultant company in accordance with Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004.

b) A resident individual is permitted to acquire securities outside India provided that the fair market value of such securities is within the limits prescribed under the Liberalised Remittance Scheme or rules and regulations framed thereunder.

c) Any office of the Indian company in India shall be deemed to be a branch office of the resultant company in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) regulations, 2016 and shall be governed by the provisions laid down thereunder.

d) The guarantees or outstanding borrowings of the Indian Company which become the liability of the resultant company shall be repaid as per the sanctioned Scheme, provided that:

- Any liability payable towards a lender in India in Rupees, not in conformity with the FEMA regulations shall not be acquired by the resultant company.

- Further, a no-objection certificate to this effect is to be obtained from the Indian lenders.

e) The resultant company may acquire, hold and transfer any asset in India which a foreign company is otherwise permitted to acquire under the Foreign Exchange Management Act, 1999 or the rules or regulations framed thereunder.

f) Where the asset or security in India is not permitted to be acquired or held by the resultant company, the resultant company is required to sell/ dispose such asset or security within a period of two years from the date of sanction of Scheme and repatriate sale proceeds outside India through banking channels. Repayment of Indian liabilities from sale proceeds of such Indian assets or securities within a period of two years is permissible.

g) The resultant company may open a Special Non-Resident Rupee Account for transactions incidental to the cross border merger which may run for a maximum period of two years from the date of sanction of the Scheme.

5. **Miscellaneous provisions**

a) Valuation norms: Valuation of Indian Company and Foreign Company shall be in accordance with Rule 25A of Companies (Compromises, Arrangement and Amalgamation) Rules, 2016.

b) Reporting requirements: Companies involved in cross border merger shall be required to furnish reports as may be prescribed by the Reserve Bank in consultation with Government of India from time to time.

c) Prior contravention/non-compliance: Companies party to a cross border merger shall ensure that any regulatory actions with respect to any non-compliance, contravention or violation under the extant FEMA provisions shall be completed prior to merger.

d) Certificate by MD/WTD/CS: A certificate from the Managing Director/Whole-Time Director and Company Secretary (if available) of the companies concerned, ensuring compliance of these Regulations are required to be furnished along with the application being made to the NCLT.

[Source: RBI Notification No. FEMA 389/2018-RB dated March 20, 2018]

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II. Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018

The Reserve Bank of India, earlier, made the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 vide Notification No. 21/2000-RB dated 03.05.2000 which came into effect from 01.06.2000.

Now the Reserve Bank of India, in supersession of the said notification as amended from time to time, has issued 'The Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, vide Notification NO. FEMA 21(R)/2018-RB, dated 26.03.2018. These regulations have come into effect from 26.03.2018.

1. These regulations provide for-

    1) Acquisition and transfer of property in India by a non resident Indian or an Overseas Citizen of India;
    2) Acquisition of immovable property for carrying on a permitted activity;
    3) Purchase/sale of immovable property by foreign embassies/Diplomats/Consulate Generals;
    4) Joint acquisition by the spouse of an NRI or an OCI;
    5) Acquisition by a Long Term visa holder;
    6) Repatriation of sale proceeds;
    7) Prohibition on acquisition or transfer of immovable property in India by citizens of certain countries; and
    8) Prohibition on transfer of immovable property in India.

2. **The significant changes brought about in the new and revised Regulations are highlighted in Bold and Italics for ease of reference.**

    1) Acquisition and transfer of property in India by a NRI or OCI

    In the new and revised Regulations, in Regulation 2 containing Definitions, the Definition of "Person of Indian Origin" has been removed and two new definitions, specifically defining "Non-Resident Indian (NRI)" and "Overseas Citizen of India (OCI)" have been inserted. Accordingly the reference of Person of Indian Origin has been replaced by the reference of NRI and OCI in the new and revised Regulations.

    Regulation 2(c) defines the expression 'Non- Resident Indian (NRI)' as a person resident outside India who is a citizen of India.

    Regulation 2(d) defines the expression 'Overseas Citizen of India (OCI)' as a person resident outside India who is registered as an Overseas Citizen of India Cardholder under section 7(A) of the Citizenship Act, 1955.

    - An NRI or an OCI is permitted to acquire immovable property in India other than agricultural land and/farm house/plantation property. The consideration, if any, for transfer is required to be made out of-

- funds received in India through banking channels by way of inward remittance from any place outside India; or
- funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed there under.

No payment for any transfer of immovable property is permitted to be made either by traveller's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause.

- An NRI or OCI is permitted to acquire any immovable property in Indian other than agricultural land/farm house/plantation property by way of gift from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in section 2(77) of the Companies Act, 2013.

- An NRI or OCI is permitted to acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property-

  - in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations; or
  - from a person resident in India.

- An NRI or OCI may transfer any immovable property in India to a person resident in India.
- An NRI or OCI may transfer any immovable property other than agricultural land/farm house/plantation property to an NRI or an OCI.

2) Acquisition of immovable property for carrying on a permitted activity

A person resident outside India who has established in India, a branch, office or other place of business for carrying in India any activity, excluding a liaison office may acquire any immovable property in India, which is necessary for or incidental to carrying on such activity provided

i. all applicable laws, rules, regulations or directions for the time being in force are duly complied with and
ii. the person files with the Reserve Bank of India, a declaration in the form IPI as prescribed by Reserve Bank of India, from time to time, not later than 90 days from the date of such acquisition.

A person resident outside India who has established in India, a branch office or other place of business for carrying in India any activity, excluding a liaison office may transfer by way of mortgage to an authorized dealer as a security for any borrowing the immovable property acquired as per i above.

No person of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea shall acquire immovable property, other than on lease not exceeding 5 years without prior approval of the Reserve Bank of India.

3) Purchase/sale of immovable property by Foreign Embassies/Diplomats/Consulate Generals

A foreign Embassy/Diplomat/Consulate General may purchase/sell immovable property in India, other than agricultural land/plantation property/farm house provided-

- clearance from Government of India, Ministry of External Affairs is obtained for such purchase/sale; and
- the consideration for acquisition of immovable property in India is paid out of funds remitted from abroad through banking channels.

4) Joint acquisition by the spouse of an NRI or an OCI (New insertion)

A person resident outside India, not being a NRI or an OCI, who is a spouse of a NRI or an OCI may acquire one immovable property, other than agricultural land/farm house/plantation property, jointly with his/her NRI/OCI spouse, subject to the following-

- The consideration for transfer shall be made out of –
    - funds received in Indian through banking channels by way of inward remittance from any place outside India; or
    - funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank.
- No payment for any transfer of immovable property shall be made either by traveller's cheque or by foreign currency notes or any other mode other than those specifically permitted;
- The marriage has been registered and subsisted for a continuous period of not less than 2 years immediately preceding the acquisition of such property;
- The non-resident spouse is not otherwise prohibited from such acquisition.

5) Acquisition by a Long Term Visa holder (New Insertion)

A person, being a citizen of Afghanistan, Bangladesh or Pakistan belonging to minority communities in those countries, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who is residing in India and has been granted a Long Term Visa (LTV) by the Central Government may purchase only one residential immovable property in India as dwelling unit for self-occupation and only one immovable property for carrying out self employment subject to the following conditions-

- the property should not be located in and around restricted/protected areas so notified by the Central Government and cantonment areas;
- the person submits a declaration to the Revenue Authority of the District where the property is located, specifying the source of funds and that he/she is residing in India on LTV;
- the registration documents of the property should mention the nationality and the fact that such person is on LTV;
- the property of such person may be attached/confiscated in the event of his/her indulgence in anti-India activities;

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- a copy of the documents of the purchased property shall be submitted to the Deputy Commissioner of Police (DCP)/Foreigners Registration Office (FRO)/Foreigners Regional Registration Office (FRRO) concerned and to the Ministry of Home Affairs (Foreigners Division);
- such person shall be eligible to sell the property only after acquiring Indian citizenship. However transfer of the property before acquiring Indian citizenship shall require prior approval of DCP/FRO/FRRO concerned.

6) Repatriation of sale proceeds

A person referred to in Section 6(5) of Foreign Exchange Management Act, 1999 or his successor is not permitted to, except with the general or specific permission of RBI, repatriate outside India, the sale proceeds of any immovable property referred to in that section.

In the event of sale of immovable property other than agricultural land/farm house/plantation property in Indian by an NRI or an OCI (***earlier read as "by a person resident outside India who is a citizen of India or a person of Indian origin"***), the authorized dealer may allow repatriation of the sale proceedings outside India, subject to the following conditions-

- the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of his acquisition or the provisions of these regulations;
- the amount for acquisition of the immovable property was paid in foreign exchange received through banking channels or out of funds held in Foreign Currency Non-Resident Account or out of funds held in Non-Resident External account;
- in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

In the event of failure in repayment of ECB availed by a person resident in India under the provisions of FEMA (Borrowing or Lending in Foreign Exchange) Regulations, 2000 as amended from time to time, a bank which is an authorized dealer may permit the Overseas lender or the security trustee to sell the immovable property on which the said loan has been secured only to a person resident in India and to repatriate the sale proceeds towards outstanding dues in respect of the said loan and not any other loan.

7) Prohibition on acquisition or transfer of immovable property in India by citizens of certain countries

No person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong Kong or Macau or ***Democratic People's Republic of Korea (DPRK)*** without prior permission of the RBI shall acquire or transfer immovable property in India, other than lease, not exceeding five years. This prohibition shall not apply to an OCI. ***It may be noted that Democratic People's Republic of Korea is the new addition made in the revised Regulations.***

Further the term "citizen" is explained to include natural persons and legal entities.

8) Prohibition on transfer of immovable property in India

Save as otherwise permitted under the FEMA 1999 or Regulations thereunder, no person resident outside India is permitted to transfer any immovable property in India, provided that:

a) The RBI may, for sufficient reasons, permit the transfer, subject to the conditions as may be considered necessary.
b) A bank which is an authorized dealer may, subject to the directions issued by the RBI in this behalf, permit a person resident in India or on behalf of such person to create charge on his immovable property in India in favour an Overseas lender or security trustee, to secure an ECB availed under the provisions of the FEMA (Borrowing or Lending in Foreign Exchange) Regulations,2000, as amended from time to time.
c) An authorized dealer in India being the Indian correspondent of an overseas lender may, subject to the directions issued by the RBI in this regard, create a mortgage on an immovable property in India owned by an NRI or an OCI, being a director of a company outside India, for a loan to be availed by the company from the said overseas lender. The funds shall be used by the borrowing company only for its business purposes overseas. In case of invocation of charge, the Indian bank shall sell the immovable property to an eligible acquirer and remit the sale proceeds to the overseas lender. (New Insertion)

d) A person resident outside India who has acquired any immovable property in India in accordance with foreign exchange laws in force at the time of such acquisition or with the general or specific permission of the Reserve bank may transfer such property to a person resident in India provided the transaction takes place through banking channels in India and provided that the resident is not otherwise prohibited from such acquisition.(New Insertion)

[Source: RBI Notification NO. FEMA 21(R)/2018-RB, dated 26.03.2018]

(Contributed by: Ms. Ruchi Sanghi)

MOHINDER PURI & CO.
CHARTERED ACCOUNTANTS

IMPORTANT

DATES TO REMEMBER

Particulars	Date
Deposit of TDS for the month of April, 2018	May 7, 2018
Date of deposit and filing of GSTR-3B for the month of April, 2018	May 20, 2018

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