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❖ Investing from tax havens to get tough

Subsidiaries of Indian companies in tax havens will be required to have business operations in those countries to be eligible to make investments in India, as the government initiates steps to check rerouting of local capital, a government official said.

The government is also planning to scrutinise books of overseas subsidiaries that have been set up with a very low capital base as they are mostly used for roundtripping, or reinvestment of capital as foreign investment, said an official in the commerce ministry on condition of anonymity.

The move comes just days after G-20 leaders threatened to crack down on tax havens. Tax havens like Mauritius and Cyprus encourage non-residents to park their money there with zero or close to zero tax rates. According to OECD, the value of assets held in such locations is between $1.7 trillion and $11.5 trillion.

Talks on for stricter rules

The Reserve Bank of India (RBI), department of industrial policy and promotion (DIPP) and Foreign Investment Promotion Board (FIPB) are in consultations to make regulations on overseas investments more stringent, the official said.

However, bona fide investments from genuine companies taking advantage of tax treaties will not be disturbed, the official added. Mauritius accounts for 43% of total FDI in India. During April-November 2008, the island nation contributed Rs 35,000 crore in FDI, compared with Rs 19,000 crore in the year-ago period. Other tax havens are also catching up. Investments from Cyprus jumped to Rs 4,486 crore during April-November, up from Rs 2,000 crore a year earlier. Last year, FIPB had held up many FDI proposals routed through tax havens on the grounds of treaty shopping—where a resident or an entity of a third country takes advantage of a tax avoidance treaty by setting up an investment arm in a tax haven—and round-tripping. The board gave its nod to Essar's proposal to invest Rs 590 crore in truck-maker Asia Motor Works through Cayman Islands based Essar Global, after deferring the decision for long. It, however, rejected JSW Steel's proposal for bringing in FDI through a Mauritius-based entity for JSW Infrastructure, as it believed the deal involved round-tripping.

❖ Govt introduces Limited Liability Partnership

India introduced a new kind of business structure, Limited Liability Partnership (LLP), a form of entity where the partners' liability is limited to the extent of their stake which will specially benefit the services sector.

The LLP Act, was passed by the Parliament and given assent by the President Pratibha Patil, was notified after being approved by the Election Commission to do so, sources in the Ministry of Corporate Affairs told PTI.

Rules under the Act were also notified. The Act will specially benefit the service sector by providing a platform to professionals like chartered accountants and company secretaries to come together to form an LLP and provide a single-window shop to all people wanting to avail professional services.

The LLP is a hybrid of partnership firms and companies. It is a separate legal entity and the partners have the advantage of being liable to the extent of their shareholding in the entity.

The software, a part of the government's e-governance programme MCA 21, for incorporating and formation of the company has been prepared and the new LLPs will register online, sources added.

❖ Judgments prevail over excise department circulars: SC

The Supreme Court emphasised that circulars and instructions issued by the customs and excise boards are no doubt binding on the authorities but when the Supreme Court or a high court declares the law on a disputed question, the courts' view shall prevail.

The court reiterated the view in the case, Commissioner of Central Excise vs Hindoostan Spinning & Weaving Mills Ltd. The authorities had sought clarifications in some earlier judgments. Therefore, the Supreme Court once again asserted that the circulars represented only the understanding of the law by the officials. But they are not binding on the courts.

Baidyanath plea on toothpaste rejected

The SC dismissed the appeal of Baidyanath Ayurvedic Bhawan Ltd, maker of 'Dant Manjan Lal', rejecting its contention the product was a medicament according to the Central Excise Tariff Act, and not a cosmetic/toiletry preparation/tooth powder.

The classification of the product had created some difference of opinion in the excise tribunals. Baidyanath resisted show cause notices on diverse grounds; that the product is an Ayurvedic Medicine that it manufactures it under a drug licence, that its ingredients are mentioned in the authoritative book of Ayurved System of Medicine, and that the product is

an Ayurvedic medicine in the trade and common parlance. Baidyanath, thus, claimed it was eligible for the benefit in excise. The SC stated that what is important to be seen is how the consumer looks at a product.

Higher damages than in the schedule can be awarded

The SC ruled in the case, Rani Gupta vs United India Insurance Co Ltd, that motor accident claims tribunals can award compensation which are higher than those prescribed in the second schedule to the Motor Vehicles Act. Parliament had thought Rs 50,000 should be the minimum compensation payable to legal representatives of persons whose annual income is Rs 3,000 per month.

In the present case, the businessman earning Rs 2 lakh a year was awarded Rs 17.4 lakh by the tribunal, which was reduced by the Delhi high court to Rs 12.5 lakh. The SC stated in view of the age of the businessman (46) he would have earned for ten more years and therefore the compensation was fair. SC not bound to hear international arbitration appeals bypassing HCs: The Supreme Court has dismissed the appeal of Shin-Etsu Chemical Co Ltd in its dispute with Vindhya Telelinks Ltd and stated that the foreign company could move the Madhya Pradesh high court for international arbitration.

The district judge in Rewa had rejected the foreign company's plea for referring the dispute to arbitration under Section 45 of the Arbitration and Conciliation Act. The company directly approached the Supreme Court in appeal. The Indian company opposed the appeal, arguing that the foreign company could not approach the Supreme Court, bypassing the high court.

This argument was accepted by the Supreme Court. It emphasised that no one had a right to appeal to the apex court, and the latter will grant special leave to hear appeals only if the parties had exhausted all other remedies available to them. Power tariff dispute remitted to tribunal: In the dispute between DLF Power Ltd and Central Coalfields, the Supreme Court has asked the parties to approach the appellate tribunal for electricity in New Delhi again to determine the tariff. In 2007 the court had directed M/s Ernst & Young to determine the actual capital cost for Rajrappa and Giddi plants based on the formula in the power purchase agreement between CCL and DLF.

It had also directed that the copy of the report of the cost accounts be given to the parties and to the Jharkhand State Electricity Regulatory Commission. CCL's complaint is that the report was made only on the basis of the documents submitted by DLF. Accepting this complaint, the court stated that as the process of evaluation involved in fixing the tariff is complex, the tribunal shall hear CCL view on tariff if it raises the issue before it. Cheque bounce punishment diluted: The Supreme Court has ruled that a person cannot be sentenced for each dishonoured cheque he had sent in the same transaction. In this case, State of Punjab vs Madan Lal, three cheques were issued by the accused person which were dishonoured.

The sessions court convicted him under Section 138 of the Negotiable Instruments Act and sentenced him to jail. The sentence for all the cheques was to run concurrently, not

consecutively. The Punjab and Haryana high court upheld the sentence. But the state government appealed to the Supreme Court arguing that the accused should suffer sentence for each cheque one after the other, and not together, as ordered by the courts below. The Supreme Court dismissed the government's appeal.

❖ Single licence for telecom equipment import

The government said the import of key communication hardware like radio equipment will require a licence from the Ministry of Communication and IT without any approval of the Commerce Ministry.

"Radio Communication equipment including VHF, UHF and Microwave Communication equipments (used for wireless operations like mobile telephony) not permitted to be imported except against a licence to be issued by the Wireless Planning Coordination (WPC) wing of the Ministry of Communication and IT," a DGFT notification said.

The notification was issued following confusion that arose among importers after March 2, 2009 when the DGFT put import of these equipment under the "restricted" category.

"This led to an impression as if the importers were required to get a licence both from the DGFT as also from the Ministry of Communications," an official said.

This equipment is imported by the mobile telecom infrastructure companies from various countries including China and Europe.

Although some of the companies like Nokia-Siemens, Ericsson and Motorola have set up manufacturing facilities in India, still a large part of demand for this equipment is met through imports.

❖ No M&As on competition panel's plate

The Competition Commission of India (CCI) will not take up local as well as foreign mergers and acquisitions immediately, as it looks to fine-tune its merger regulations before assuming the role of a full-fledged regulator.

However, the commission, which will be operational in the next few days, will take up cases of anti-competitive practices, cartelisation and abuse of dominance, as the competition law allows the government to notify its various provisions in phases, said a CCI official, who asked not to be named.

CCI's revised regulations on mergers and acquisitions —combinations, in legal parlance— will make the application of competition law more rational by excluding from regulation the deals which do not adversely affect competition but are covered by the asset-turnover criteria.

The idea is to further fine-tune the merger regulation drafted earlier by CCI during the tenure of its former member and acting chairman Vinod Dhall. Considering its impact on corporate deals, the full commission, chaired by former World Bank executive director Dhanendra Kumar, will do some more consultation with the corporate world before finalising it, the official said.

Competition law says that any deal where the combined entity meets an asset-turnover criteria has to be vetted by the regulator. This implies that an insignificant acquisition by a big company, which does not impact competition, too has to be vetted by the regulator.

Based on suggestions from the corporate world, the draft merger code prepared by Mr Dhall sought to prescribe individual asset and turnover threshold for at least two parties in the deal. It also prescribed such individual threshold for a cross-border deal: at least two parties should have assets of minimum Rs 200 crore or turnover of Rs 600 crore in India to attract CCI scrutiny.

The draft regulation also sought to reduce the time to clear an M&A deal to 30 days while the law allows CCI to take up to a maximum 210 days. These norms are expected to be fine-tuned now. The model code of conduct in force ahead of national polls does not prevent the government from notifying competition law provisions as it is merely operationalising a statutory body, the CCI official said. Competition law was amended in 2007 to give adjudication powers to the CCI.

❖ Listed cos to be audited only by those peer-reviewed by ICAI

Accounting regulator ICAI said all listed companies would be audited by only those who have been certified by the Peer Review Board of the institute

"The council had accepted the recommendation of SEBI that audit of listed companies shall be carried out by auditors who have undergone Peer Review Process and have been issued Peer Review Certificate by the Board.

"The decision is effective for accounting periods commencing on or after April 1, 2009," the Institute of Chartered Accountants of India (ICAI) said in a statement.

Peer review is the process of evaluation of performance by other chartered accountants in order to maintain or enhance the quality of the work or performance. It helps in obtaining an unbiased evaluation.

The ICAI said the Board is in the process of covering those audit firms that have not yet been selected for the Peer Review Process. After the multi-crore rupee Satyam scam came to light, SEBI had announced a peer review of the Sensex and Nifty companies to preclude similar frauds.

❖ CBDT task force to advise on preventing tax treaty abuse

Mauritius & Cyprus May Be Told To Legislate Anti-Abuse Amendments

WITH global and political will turned against tax havens, New Delhi is looking to turn the heat on Mauritius and Cyprus to amend tax treaties with these countries or bring in anti-abuse provisions in their local laws.

The Central Board of Direct Taxes (CBDT) has set up a special task force to suggest ways to prevent abuse of double taxation avoidance agreements (DTAAs), said a government official, who did not wish to be identified. The task force would look at the prevalent global best practices adopted by the US and others to see how they can be replicated here and ensure India's tax treaties are transparent and promote information-sharing.

India's attempts to amend the treaty with Mauritius, from where the country receives 43% of its foreign investments, have so far met with tremendous diplomatic resistance from the island nation.

The just-concluded G-20 summit on global financial crisis in London had raised the pitch on scrapping DTAAs. DTAAs are pacts between two countries that seek to eliminate double taxation of income or gains arising in one country and paid to residents or companies of the other country. The idea is to ensure that the same income is not taxed twice.

However, in some cases, these treaties are misused to avoid taxes, leading to a loss of revenue to a country's exchequer. This is called treaty shopping, where residents of a third country take advantage of a tax treaty between two countries, by routing their investments from there to avoid taxation. As per some available estimates, India loses more than $600 million every year in revenues on account of the DTAA with Mauritius.

New Delhi had also considered a limitation of benefit clause in the treaty, to prevent ineligible entities from taking advantage, the official said. Through this clause, the government can put in conditions such as listing on the local stock exchange in any of the countries, ceiling on turnover and cap on expenditure for carrying out operations in one of the contracting states. Both India-Mauritius and India-Cyprus tax treaties provide that capital gains arising in India from the sale of securities can only be taxed in Mauritius and Cyprus. This leads to zero taxation as there is no capital gains tax in these countries.

After failing in its attempt to amend the tax treaty, the UPA government tried to introduce treaty anti-abuse provisions in Budget 2007, but dropped the idea subsequently as work on the new comprehensive direct tax code had begun by then.

Indian tax authorities have upped their ante after the Vodafone-Hutch deal in which the transaction was carried out through subsidiaries domiciled in Mauritius and Cayman Islands, in the case that involves a tax demand of about $1.7 billion.

However, now, since direct tax code may not come into effect anytime soon, effort may be made to bring some such provisions in the tax laws in the forthcoming Budget itself, since all leading political parties have expressed desire to contain such tax havens. "We should endorse sharing information and bringing tax havens and non-cooperating jurisdictions under closer scrutiny," Prime Minister Manmohan Singh had said at the G-20 dinner. Senior BJP leader LK Advani has also raised his pitch against black money stashed away in such tax havens.

Some countries such as Singapore and Canada have opted for a general anti-avoidance rule (GAAR) that allows examination of the real nature of a transaction and a limitation of benefits clause to ensure that treaty benefits accrue only to genuine investors. Singapore also allows examination of the real nature of a transaction.

The US government has empowered itself through a legislation that allows it to declare a country as a tax haven and impose additional tax on investments coming in from there.

It may be noted that India has already amended its tax treaty with the United Arab Emirates.

Check Mates

CBDT task force would look at global best practices to replicate those here India loses more than $600 million every year due to double taxation avoidance agreement with Mauritius .Both India-Mauritius and India-Cyprus tax treaties provide that capital gains arising in India from the sale of securities can only be taxed in Mauritius and Cyprus.

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The editors of this report can be reached at **MAHESHWARI & CO., Advocates and Legal Consultants, B – 7/1, Safdarjung Enclave Extension., New Delhi –110 029, Tel:** ***91-11-26101906,09910066777 Fax: 91-11-26171201.***

E.mail:info@maheshwariandco.com