NEWSLETTER

SEPTEMBER 2010

M. V. DAMANIA & Co.

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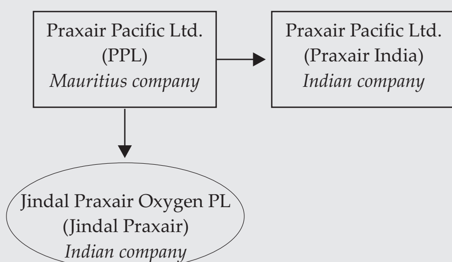
INTERNATIONAL TAX

AAR Ruling in the case of Praxair Pacific Limited, Mauritius.

Facts: Praxair Pacific Ltd. – a Mauritius Company proposes to transfer its 74% equity stake in Jindal Praxair to its wholly owned subsidiary Company in India – Praxair India.



Issues: Several issues were raised before the AAR on the taxability on transfer of such shares.

AAR Ruling: The AAR observed and Ruled on these issues as follows:

- **Whether the investment made by PPL in the equity shares of Jindal Praxair would be considered as "Capital Assets"?**
  - Since the year 1995, PPL held the shares as "Investment in subsidiaries" under the head Non-Current Assets. These shares were never traded since then. Since the shares were never held as stock in trade, the same were considered to be in the nature of "Capital Assets."
- **Whether such transfer would be liable to be taxed in India?**
  - Since the PPL proposes to transfer the shares to its Wholly Owned subsidiary in India, it satisfies the conditions laid down in Section 47(iv) of The Income Tax Act and hence such capital gains will not be taxablein India as per the Domestic Act.
  - According to the Article 13 on Capital Gains in the DTAA between India and Mauritius, since PPL is a tax resident of Mauritius and has been issued the Tax Residency Certificate by the Mauritius Authority, capital gain on sale/transfer of shares would be taxable only in Mauritius and not in India.
- **Whether PPL would be liable to Minimum Alternate Tax (MAT) under ITA?**
  - PPL would not be liable to tax on book profits. Under Section 115 B of The Income Tax Act, MAT would be applicable only to the Domestic Companies and not to any Foreign Companies. The AAR relied on the decision of Timken USA where it was held that under the Companies' Act; only such foreign Companies who have established a place of business within India are required to make out a Balance Sheet and Profit and Loss Account as per Schedule VI. Thus, since PPL does not have a PE in India, Section 115B is not attracted in the case of PPL.
- **Whether proposed transfer of equity shares attracts Transfer Pricing provisions?**
  - In absence of any liability to pay tax on Capital Gains, Transfer Pricing provisions would not be applicable to this transaction.

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INTERNATIONAL TAX

Clarification on term of Technical Services by Supreme Court

In recent decision, Supreme Court has clarified on requirement for human intervention in order to consider services as Fees for Technical Services ("FTS") under Section 9(1)(vii) of the Income-tax Act, 1961.

FACTS OF THE CASE

- Assessee's were cellular companies engaged in business of providing cellular telephone services.
- Private Service providers had entered into license agreements with Government and other service providers that calls of cellular companies had to be routed to/from networks of Another Service Provider where services of other providers were not present.
- Every Telecom Service Provider were required to pay interconnection charges, access and port charges under agreement to provider of interconnection facility i.e. MTNL/ BSNL for providing above said services of so that customer receives seemless connectivity for calls made/received.

CONTENTION OF ASSESSING OFFICER

- Assessing Officer treated above payments by cellular services companies towards interconnection charges as "Fess for Technical Services" and also held tax will be required to be deducted at source.

CONTENTION OF ASSESSEE

- Contention of Cellular companies was that consideration paid related to provision of standard facility and did not involve rendering services which are in nature of technical, managerial or consultancy as defined in Act.
- Commissioner (Appeals) upheld views of AO, whereas, Tribunal allowed appeal in favor of taxpayers.

OBSERVATION BY HIGH COURT

- Income Tax Department preferred appeal before Delhi High Court.
- Delhi HC observed that interconnection; port and access charges were paid for using already existing network of other cellular service providers and did not involve rendering assistance / aid in managing, operating and setting-up of infrastructure facility to cellular companies. The term "technical" used under section 9 is not separately defined in Act but has been used with two other words namely "managerial" and "consultancy". Therefore word "technical" has to be read along with the meaning of words "managerial" and "consultancy".
- From analysis of managerial and consultancy services, it is seen that such services are provided by humans only. Similarly, expression "technical service" would also require presence of human element in course of providing services.
- Therefore payments towards interconnection, port and access charges are towards services that do not involve any human intervention and same would not be treated as "technical services"
- Accordingly payments would not be subject to withholding as per provisions of section 194J of the Act.

OBSERVATION BY SUPREME COURT

Arguments of Income Tax Department

- Provision of interconnect/port access facility was in nature of a service
- License Agreement between parties themselves described such arrangement as providing telecommunication services.
- Services were of technical nature in sense that it was connected with use of sophisticated machinery involving expertise, skill and technical knowledge

Arguments of Cellular companies

- Collection of fee is for use of a standard facility (as is practice in industry) and not as Fees for Technical Services and the license agreement was similar to revenue sharing agreement and not fees for services
-
- Fees for Technical Services has been defined in Explanation 2 to section 9(1)(vii) of the Act wherein phrases used are "consideration for the rendering of any managerial, technical or consultancy services…"
- The above said phrase require that managerial and consultancy services involve human interface/ element, same was implication applies to technical service also

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Clarification on term of Technical Services by Supreme Court

- Entire process was automated and did not involve human intervention. Therefore facility of interconnection/port access cannot be regarded as technical service

Observation by Supreme Court
Findings by Supreme Court were as follows:

- Various High Courts and Tribunals have defined and referred term "technical services" in narrower sense because technical services appear in between words "managerial and consultancy services"
- Department has failed to provide any expert evidence or finding to suggest that human intervention is involved in interconnection process.
- Definition of Fees for Technical Services is critical aspect that will assist Courts and Tribunals in deciding whether subject payments were in nature of "technical services" and if it accordingly had to suffer withholding tax.
- Arguments of cellular companies that license agreement were more of a revenue sharing agreement which was not examined by Income Tax Department or by Tribunal.
- Cellular companies were not at fault because aspect of human intervention was not brought up by Income Tax Department before lower authorities.
- Supreme Court also directed Central Board of Direct Taxes that Income Tax Department should not conclude merely on basis of contracts but also on basis of views of technical experts.

COMMENTS ON ABOVE DECISION

- Human intervention is pre-requisite for services to be considered as Fees for Technical Services.
- Observations will assist in order to decide whether to withhold tax on domestic payments as well as cross-border remittances under section 195 of Act where same definition under section 9 applies.
- The observation will have larger impact to subsidiaries of multinational corporations in India in deciding on withholding requirement for various payments made to overseas Parent Company.

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FOREIGN EXCHANGE MANAGEMENT MANUAL

Foreign Direct Investment

I. Foreign Investments in India

Foreign Investment in India is governed by the FDI Policy announced by the Govt. of India and the provisions of the Foreign Exchange Management Act (FEMA) 1999.

FDI is defined as investment by non-resident entity/person resident outside India in the capital of the Indian Company in accordance with FEMA Regulations.

Foreign Investments

Foreign Direct Investments	Foreign Portfolio Investments	Foreign Venture Capital Investments	Other Investments	Investments on non-repatriable basis
i) Automatic route	i)FIIs	i) SEBI registered	Govt. sec	i)NRIs, PIOs
ii) Govt. Route	ii) NRIs/PIOs	FCVIs		

II. What is Foreign Direct Investment?

Foreign direct investment (FDI) is that investment, which is made to serve the business interests of the investor in a company, which is in a different nation distinct from the investor's country of origin.

A parent business enterprise and its foreign affiliate are the two sides of the FDI relationship. Together they comprise an MNC. The parent enterprise through its foreign direct investment effort seeks to exercise substantial control over the foreign affiliate company.

III. India's Foreign Direct Investment Policy

Foreign Direct Investment in India is allowed on automatic route in almost all sectors except :-

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1. Proposals that require industrial license and cases where foreign investment is more than 24% in the equity capital of units manufacturing items reserved for the small scale industries.
2. Proposals in which the foreign collaborator has a previous venture/ tie-up in the same field of economic activity in India and
3. Proposals falling outside notified sectoral policy/ caps or under sectors in which FDI is not permitted.

Foreign Investments are approved through two routes:

(i) Automatic Route:

FDI upto 100% is allowed under the automatic route in all sectors except the ones mentioned under prohibited list of sectors and subject to sectoral caps under the India's FDI policy. These activities do not require any prior approval either by the Government or RBI.

(ii) Government Approval

All other cases where the automatic route is not allowed require prior specific approval from the Foreign Investment Promotion Board. Indian companies having foreign investment approval through FIPB route do not require any further clearance from RBI for receiving inward remittance and issue of shares to the foreign investors

There are certain items or activities for which FDI is **prohibited** i.e. these items do not come under either Automatic route or Government approval. These items have been stated under **FEMA** which are as follows:-

1. Retail Trading (except single brand product retailing)
2. Atomic Energy
3. Lottery Business
4. Gambling and Betting
5. Business of chit fund and Nidhi Company
6. Trading in Transferable Development Rights (TDRs)
7. Real Estate business and Construction of Farm Houses
8. Agriculture (excluding Floriculture, Horticulture, Animal Husbandry)
9. Activities/Sectors not opened to private sector investment.

IV. Sectoral cap on investment by persons resident outside India

S. no.	Sector	Investment Cap
1.	Private Sector Banking	74%
2.	Non- Banking Financial Companies	100%
3.	Insurance	26%
4.	Telecommunications	74%
5.	Development of Township, Built-up infrastructure	100% (subject to certain conditions)
6.	Retail Trading (Single brand products)	51%
7.	Hotel & Tourism100%	
8.	Power	100%
9.	Roads, Highways, Ports and Harbours	100%
10.	Special Economic Zones	100%

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V. In what form can the investments be made ?

a) Equity shares
b) Fully, compulsory and mandatory convertible Preference shares
c) Fully, compulsory and mandatory convertible debentures
d) ADR/ GDR/FCCB

Reporting of Inflow

(i) An Indian company receiving investment from outside India for issuing shares / convertible debentures / preference shares under the FDI Scheme, should report the details of the amount of consideration to the Regional Office concerned of the Reserve Bank not later than 30 days from the date of receipt in the Advance Reporting Form.

(ii) Indian companies are required to report the details of the receipt of the amount of consideration for issue of shares / convertible debentures, through an AD Category – I bank, together with a copy/ies of the FIRC/s evidencing the receipt of the remittance along with the KYC report on the non-resident investor from the overseas bank remitting the amount. The report would be acknowledged by the Regional Office concerned, which will allot a Unique Identification Number (UIN) for the amount reported.

Reporting of issue of shares

(i) After issue of shares (including bonus and shares issued on rights basis and shares issued under ESOP)/fully, mandatorily & compulsorily convertible debentures / fully, mandatorily & compulsorily convertible preference shares, the Indian company has to file Form FC-GPR, not later than 30 days from the date of issue of shares.

(ii) Part A of Form FC-GPR has to be duly filled up and signed by Managing Director/Director/Secretary of the Company and submitted to the Authorized Dealer of the company, who will forward it to the Reserve Bank. The following documents have to be submitted along with Part A:

(a) A certificate from the Company Secretary of the company certifying that:
i) all the requirements of the Companies Act, 1956 have been complied with;
ii) terms and conditions of the Government's approval, if any, have been complied with;
iii) the company is eligible to issue shares under these Regulations; and
iv) the company has all original certificates issued by authorized dealers in India evidencing receipt of amount of consideration.

Note: For companies with paid up capital with less than Rs.5 crore, the above mentioned certificate can be given by a practicing company secretary.

(b) A certificate from Statutory Auditor or Chartered Accountant indicating the manner of arriving at the price of the shares issued to the persons resident outside India. Now, the price of the shares must be determined by Discounted Cash Flow (DCF) Method.

(c) The report of receipt of consideration as well as Form FC-GPR have to be submitted by the AD Category-I bank to the Regional Office concerned of the Reserve Bank under whose jurisdiction the registered office of the company is situated.

Part - B of Form FC-GPR should be filed on an annual basis by the Indian company, directly with the Reserve Bank. This is an annual return to be submitted by 31st of July every year, pertaining to all investments by way of direct/portfolio investments/reinvested earnings/other capital in the Indian company made during the previous years (i.e. the information in Part B submitted by 31st July will pertain to all the investments made in the previous years up to March 31). The details of the investments to be reported would include all foreign investments made into the company which is outstanding as on the balance sheet date. The details of overseas investments in the company both under direct / portfolio investment may be separately indicated.

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Issue of bonus/rights shares or stock options to persons resident outside India directly or on amalgamation / merger/demerger with an existing Indian company, as well as issue of shares on conversion of ECB / royalty / lump sum technical know-how fee / import of capital goods by units in SEZs has to be reported in Form FC-GPR.

Reporting of transfer of shares

Reporting of transfer of shares between residents and non-residents and vice- versa is to be done in Form FC-TRS. The Form FC-TRS should be submitted to the AD Category – I bank, within 60 days from the date of receipt of the amount of consideration. The onus of submission of the Form FC-TRS within the given timeframe would be on the transferor / transferee, resident in India. The AD Category – I bank, would forward the same to its link office. The link office would consolidate the Form FC-TRS and submit a monthly report to the Reserve Bank.

Reporting of Non-Cash

Details of issue of shares against conversion of ECB have to be reported to the Regional Office concerned of the RBI, as indicated below:

(i) In case of full conversion of ECB into equity, the company shall report the conversion in Form FC-GPR to the Regional Office concerned of the Reserve Bank as well as in Form ECB-2 to the Department of Statistics and Information Management (DSIM), Reserve Bank of India, Bandra-Kurla Complex, Mumbai – 400 051, within seven working days from the close of month to which it relates. Once reported, filing of Form ECB-2 in the subsequent months is not necessary.

(ii) In case of partial conversion of ECB, the company shall report the converted portion in Form FC-GPR to the Regional Office concerned as well as in Form ECB-2 clearly differentiating the converted portion from the non-converted portion. The words "ECB partially converted to equity" shall be indicated on top of the Form ECB-2. In the subsequent months, the outstanding balance of ECB shall be reported in Form ECB-2 to DSIM.

Reporting of FCCB/ADR/GDR Issues

The Indian company issuing ADRs / GDRs has to furnish to the Reserve Bank, full details of such issue within 30 days from the date of closing of the issue. The company should also furnish a quarterly return in the Form as prescribed, to the Reserve Bank within 15 days of the close of the calendar quarter. The quarterly return has to be submitted till the entire amount raised through ADR/GDR mechanism is either repatriated to India or utilized abroad as per the extant Reserve Bank guidelines.

ADHERENCE TO GUIDELINES/ORDERS AND CONSEQUENCES OF VIOLATION

FDI is a capital account transaction and thus any violation of FDI regulations are covered by the penal provisions of the FEMA. Reserve Bank of India administers the FEMA and Directorate of Enforcement under the Ministry of Finance is the authority for the enforcement of FEMA. The Directorate takes up investigation in any contravention of FEMA.

Penalties

(i) If a person violates/contravenes any FDI Regulations, by way of breach/non-adherence/noncompliance/ contravention of any rule, regulation, notification, press note, press release, circular, direction or order issued in exercise of the powers under FEMA or contravenes any conditions subject to which an authorization is issued by the Government of India/FIPB/Reserve Bank of India, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contraventions where such amount is quantifiable, or up to two lakh Rupees where the amount is not quantifiable, and where such contraventions is a continuing one, further penalty which may extend to five thousand Rupees for every day after the first day during which the contraventions continues.

(ii) Where a person committing a contravention of any provisions of this Act or of any rule, direction or order made there under is a company (company means any body corporate and includes a firm or other association of individuals as

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defined in the Companies Act), every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

(iii) Any Adjudicating Authority adjudging any contraventions as stated above, may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government.

Adjudication and Appeals

(i) For the purpose of adjudication of any contravention of FEMA, the Ministry of Finance as per the provisions contained in the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 appoints officers of the Central Government as the Adjudicating Authorities for holding an enquiry in the manner prescribed. A reasonable opportunity has to be given to the person alleged to have committed contraventions against whom a complaint has been made for being heard before imposing any penalty. (ii) The Central Government may appoint as per the provisions contained in the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000, an Appealing Authority/ Appellate Tribunal to hear appeals against the orders of the adjudicating authority.

Compounding Proceedings

Under the Foreign Exchange (Compounding Proceedings) Rules 2000, the Central Government may appoint 'Compounding Authority' an officer either from Enforcement Directorate or Reserve Bank of India for any person contravening any provisions of the FEMA. The Compounding Authorities are authorized to compound the amount involved in the contravention to the Act made by the person. The Compounding Authority may call for any information, record or any other documents relevant to the compounding proceedings. The Compounding Authority shall pass an order of compounding after affording an opportunity of being heard to all the concerns as expeditiously as and not later than 180 days from the date of application made to the Compounding Authority.

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CORPORATE GOVERNANCE

Objective Corporate governance is the set of processes, customs, policies, laws, and institutions affecting the way a corporation (or company) is directed, administered or controlled. Corporate governance also includes the relationships among the many stakeholders involved and the goals for which the corporation is governed. The principal stakeholders are the shareholders, the board of directors, employees, customers, creditors, suppliers, and the community at large.

Corporate governance is a multi-faceted subject. An important theme of corporate governance is to ensure the accountability of certain individuals in an organization through mechanisms that try to reduce or eliminate the principal-agent problem. A related but separate thread of discussions focuses on the impact of a corporate governance system in economic efficiency, with a strong emphasis on shareholders' welfare. There are yet other aspects to the corporate governance subject, such as the stakeholder view and the corporate governance models around the world.

In short, Corporate Governance is a set of standards, which aims to improve the Company's image, efficiency, effectiveness and social responsibilities.

According to a report on corporate governance by Kumar Mangalam Committee1999, *"The fundamental objective of corporate governance is the enhancement of long-term shareholder value while, at the same time, protecting the interests of other stakeholders."*

In fact, Corporate Governance is an Endeavor to become a model corporate citizen. Aristotle said: *"it is not the same thing to be a good man and a good citizen."* One may be a good man because he is nice to his near and dear ones. But unless one is nice to the large body of the unseen people (i.e., Society), he is not a good citizen. Thus, in essence, Corporate Governance translate into conducting the affairs of a Company in a manner that ensures fairness to customers, employees, shareholders, fund providers, suppliers, the regulators and the society as a whole.
There has been renewed interest in the corporate governance practices of modern corporations since 2001, particularly due to the high-profile collapses of a number of large U.S. firms such as Enron Corporation and MCI Inc. (formerly WorldCom). In 2002, the U.S. federal government passed the Sarbanes-Oxley Act, intending to restore public confidence in corporate governance.

The Companies (Amendment) Act, 2000 has introduced good Corporate Governance leading to more transparent, ethical and fair business practice to be adopted by Corporate at large.

The following provisions may be noted:
Section 217(2AA) deals with Directors Responsibility Statement to be included in the Directors Report.

Section 292A provides for constitution of Audit Committee.

Section 274(1) (g) debars a person to act as a Director of a public Company if default in filing Annual Return/Accounts for continuous three

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financial years or repayment of deposits/ interest/debentures/dividend has taken place, and such failure continues for a period of one year or more.

Section 275 provides for appointment of a person as a Director in a maximum of 15 companies.

Clause 49 of the Listing Agreement of the Stock Exchanges also provides for promoting and raising the standards of Corporate Governance in respect of listed companies.

Directors Responsibility Statement (DRS) (Section 217(2AA))

The Directors Report shall now include a DRS on the following aspects:

1. Applicable accounting standards have been followed in preparation of financial statements along with proper reasons/explanations for material departures.
2. Accounting policies as prescribed are consistently applied.
3. Judgments and estimates are made in a reasonable and prudent manner to ensure true and fair view of the state of affairs and of the Profit & Loss Account.
4. Adequate accounting records are maintained in accordance with the provisions of the Companies Act, 1956 for safeguarding the assets of the Company and for preventing and detecting frauds and other irregularities.
5. Financial statements have been drawn up on a going concern basis.

Salient Features of Section 292A

Every listed Public Company and unlisted companies having a paid-up capital of at least `` 5 crores shall constitute a Committee of the Board to be known as Audit Committee. The provisions in respect of the same are as follows:

1. The Committee shall have at least three (3) members.
2. Two-thirds (2/3) of the members shall be non-executive directors other than managing director or whole-time director.
3. The Board of Directors shall prescribe the Committee's terms of reference in writing.
4. The members of Audit Committee shall elect a Chairman from amongst themselves.
5. The statutory auditor, the internal auditor and director-in- charge of finance shall attend every meeting of the Audit Committee but shall not have the right to vote.
6. Half-yearly and Annual accounts will be discussed by the Audit Committee with auditors before presenting the same to the Board.
7. The Audit Committee shall have the right to investigate any matter covered by the terms of reference.
8. The recommendations of the Audit Committee on any matter relating to financial management will be binding on the Board. Though the Board is a superior body, yet it cannot override the recommendation of the Committee.
9. In case the Board does not accept the recommendations of the Audit Committee, it will have to record the reasons and communicate the same to the shareholders.
10. The Chairman of the Audit Committee shall attend the annual general meeting to provide clarifications on matters relating to audit.
11. The composition of the Audit Committee shall be disclosed in the annual report of the Company.
12. The minutes of the Audit Committee are required to be placed before the next Board Meeting.
13. Provision regarding quorum of the Audit Committee, needs to be laid down by the Board while constituting the Committee, If not spelt out, the whole of the committee, it appears must meet. [Liverpool Household Stores Association Ltd. (1890) 59 LJ Ch 616, ref. Companies Act by A. Ramaiya page 2620 of 2001 edn.]
14. Any default in complying the said provisions may entail prosecution up to one year or fine up to `` 50,000 or both. The prosecution lies against the Company and every officer of the Company who is in default. The offence is compoundable u/s 621A.

Corporate Governance at Infosys

'Corporate Governance at Infosys 'talks about the corporate governance practices at Infosys, one of India's largest software companies. Till late 1990s, corporate governance did not have much significance in India. In 1999, two committees (Confederation of Indian Industries, CII and the Kumar Mangalam Birla Committee) were set up to recommend good governance norms. These committees came out with several recommendations, which were made mandatory for the companies to adhere to by 2001. Infosys was one of the first companies in India which had complied with most of the recommendations made by the committees.

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CORPORATE GOVERNANCE *(cont.)*

By the late 1990s, Infosys Technologies Limited (Infosys) had clearly emerged one of the best managed companies in India. Its corporate governance practices seemed to be better than those of many other companies in India. Because of its good governance practices, Infosys was the recipient of many awards. In 2001, Infosys was rated India's most respected company by Business World. Infosys was also ranked second in corporate governance among 495 emerging companies in a survey conducted by Credit Lyonnais Securities Asia (CLSA) Emerging Markets. It was voted India's best managed company five years in a row (1996-2000) by the Asia money poll. In 2000; Infosys had been awarded the "National Award for Excellence in Corporate Governance" by the Government of India. In 1999, Infosys had been selected as one of Asia's leading companies in the Far Eastern Economic Review's REVIEW 2000 Survey and voted India's most admired company by The Economic Times.

Infosys had also provided all the information required by the Cadbury committee. Infosys had benchmarked its corporate governance practices against those of the best managed companies in the world. It was one of the first companies in India to publish a compliance report on corporate governance; based on the recommendations of a committee constituted by the Confederation of Indian Industries (CII).Infosys maintained a high degree of transparency while disclosing information to stakeholders.

Infosys had accepted the recommendation of both the CII and the Kumar Mangalam Birla Committee. Infosys had an executive chairman and chief executive officer (CEO) and a managing director, president and chief operating officer (COO). The CEO was responsible for corporate strategy, brand equity, planning, external contacts, acquisitions, and board matters. The COO was responsible for all day-to-day operational issues and achievement of the annual targets in client satisfaction, sales, profits, quality, productivity, and employee empowerment and employee retention. The CEO, COO, executive directors and the senior management made periodic presentations to the board on their targets, responsibilities and performance.

Some analysts felt that Infosys' corporate governance practices offered many lessons to corporate India. Infosys had shown that increasing shareholder wealth and safeguarding the interests of other stakeholders was not incompatible. Infosys had given its non-executive directors the mandate to pass judgment on the efficacy of its business plans. Every non-executive director not only played an active role in decision making, but also led or served on at least one of the three (Nomination, Compensation and Audit) committees.

Narayan NR Murthy, Chairman and CEO, Infosys Technologies Limited (Infosys), 2001 said regarding Corporate Governance *"We've always striven hard for respectability, transparency and to create an ethical organisation. There are certain expectations that we haven't fulfilled. But we're also a very young organisation and in areas like track record of management, we may be low because we're yet to show longevity."*

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BUSINESS COMBINATION
Major items of GAAP differences (IFRSs vis a vis Indian GAAP):

S.No	Particulars	As per IFRSs	As per Indian GAAP
	Relevant Text	**IFSR3** **Business Combination**	AS14 Accounting for Amalgamation
1.	Applicability	Applicable to All Business combination excluding entities under common control / combination of entities.	Applicable to all amalgamation in the nature of merger/ purchase even if the said entities are under common control.
		Acquisition of Business	Acquisition of company
2.	Method	All business combinations are accounted using purchase/ acquisition method only.	Both methods i.e. purchase method and pooling of Interest method is permitted.
3.	Recognition	Assets identified and liabilities assumed – At Fair value	Assets and Liabilities acquired at either book value or at fair value.
4.	Contingent Consideration/ Contingent Liabilities/ reacquired rights/ indemnification assets	Specific recognition criteria's are defined at the time of acquisition in contrary with applicable IFRSs. Further subsequent measurement criteria's are also defined on reporting dates.	No specific guidance in AS but prudence norms needs to be followed.
5.	Pre- acquisition transactions	Accounting treatment specifically defined.	No specific guidance
6.	Non- Controlling Interest	Non Controlling interest is accounted transaction by transaction basis either at fair value or on proportionate basis at fair value of identifiable net assets of acquired.	Minority Interest is determined based on the proportionate share in the net asset (based on the financial statement) on the date of acquisition.
7.	Goodwill	FV of consideration transferred + FV of Non controlling interest+ FV of earlier acquisition in case of stage by stage acquisition (A) minus FV of Assets acquired – FV of liabilities assumed (B) Positive difference= Goodwill Negative Difference= Bargain Purchase in Income statement	Consideration transferred Minus Net Asset value of transferor company recorded in Financial statements of Transferee Company on acquisition date. Positive difference= Goodwill Negative Difference= Capital reserve
		Tested for impairment on annual basis	Goodwill on Amalgamation- Amortized over a period not exceeding 5 years. Goodwill on acquisition- Tested for impairment.

continued..

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S.No	Particulars	As per IFRSs	As per Indian GAAP
	Relevant Text	**IFSR3** Business Combination	AS14 Accounting for Amalgamation
8.	Treatment of Reserves	Strictly as per IFRS Guidelines only	If treatment of reserves specified in amalgamation scheme approved by any statute, then said treatment can over ride this accounting standard.
9.	Related cost	Acquisition cost to be transferred to Income statement except expenses relation to issue of equity/ debt instruments at the time of acquisition.	No specific guidance
10.	Measurement Period	Provisional accounting of Business combination permitted till completion of 12 months from acquisition date in case of in- between reporting dates.	No concept of measurement period. Specific accounting needs to be done on acquisition date.
11.	Reverse Merger	Identification criteria and accounting treatment specifically defined.	No specific guidance

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DIGITAL SIGNATURE

ABOUT DIGITAL SIGNATURE CERTIFICATE:

A Digital Signature Certificate, like hand written signature, establishes the identity of the sender filing the documents through internet which sender can not revoke or deny. Accordingly, Digital Signature Certificate is a digital equivalent of a hand written signature which has an extra data attached electronically to any message or a document. Digital Signature also ensures that no alterations are made to the data once the document has been digitally signed. A DSC is normally valid for 1 or 2 years, after which it can be renewed.

LEGAL RECOGNITION: THE INFORMATION TECHNOLOGY ACT, 2000

ITA 2000 provides the required legal recognition to the digital signatures based on asymmetric cryptosystems. The digital signatures are now accepted at par with handwritten signatures and the electronic documents that have been digitally signed are treated at par with paper documents.

WHY IS DSC REQUIRED?

Like physical documents are signed manually, electronic documents, for example e-forms

are required to be signed digitally using a Digital Signature Certificate.

TYPES OF DIGITAL SIGNATURE:

There are basically 3 types of Digital Signature Certificates Class-1, Class-2 & Class-3-- each having different level of security.

Class 1- signatures are used for identification of username/email ID [stating that, a particular username/email ID belongs to a particular person]. However, it is not allowed to sign any Statutory / Business Documents.

Class 2 -signatures are issued to the Individuals- for either Personal [A] or Business Purposes [B].

Class 3 -signatures are issued to the Businesses- on either Individual [A] or Organization Level [B].

- It is important to note that, to avail Class 3 signatures, applicant should appear infront of Certifying Authority [or a authorized person by Certifying Authority] and submit the documents.

- But Class 2 signatures can be availed from Dealers / Resellers of Certifying Authority, by submitting the documents.

WHO NEEDS A DIGITAL SIGNATURE CERTIFICATE?

Under MCA21 every person who is required to sign manual documents and returns filed with ROC is required to obtain a Digital Signature Certificate (DSC). Accordingly following have to obtain Digital Signature Certificate:

1. Directors
2. Auditors
3. Company Secretary - Whether in practice or in job.
4. Bank Officials - for Registration and Satisfaction of Charges
5. Other Authorized Signatories

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DIGITAL SIGNATURE *(cont.)*

.
All the authorized signatories of company under MCA21 require Class-2 Digital Signature Certificate.

Similarly any document filed by CA/CS/CWA & TAX PRACTIONERS under MCA21 require Class-2 Digital Signature Certificate.

TECHNICAL ASPECTS:
Digital signatures are an application of asymmetric key cryptography.

- Cryptography is primarily used as a tool to protect national secrets and strategies. It is extensively used by the military, the diplomatic services and the banking sector.

- One of the landmark developments in the history of cryptography was the introduction of the revolutionary concept of public-key cryptography.

- In 1978, Ron Rivest, Adi Shamir and Leonard Adleman discovered the first practical public-key encryption and signature scheme, now referred to as RSA (after the names of its inventors).

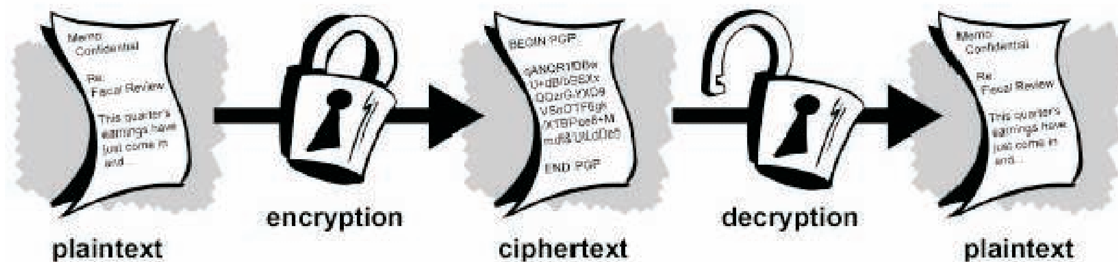
CRYPTOGRAPHY:

- Cryptography is the science of using mathematics to encrypt and decrypt data.

- Cryptography enables you to store sensitive information or transmit it across insecure networks (like the Internet) so that it cannot be read by anyone except the intended recipient

- A cryptographic algorithm, or cipher, is a mathematical function used in the encryption and decryption process.

Encryption is used to ensure that information is hidden from anyone for whom it is not intended, even those who can see the encrypted data. The process of reverting cipher text to its original plaintext is called decryption.



The fundamental objective of cryptography is information security. Simply put, it is to ensure the following:

- Confidentiality is used to keep the content of information secret from unauthorized persons. This is achieved through symmetric and asymmetric encryption.

- Data integrity addresses the unauthorized alteration of data. This is addressed by hash functions.

- Authentication is related to identification. This function applies to both entities and information itself. This is achieved through digital signature certificates and digital signatures.

- Non-repudiation prevents someone from denying previous commitments or actions. This is achieved through digital signature certificates and digital signatures

USED BY:

- For ROC e-Filing : You will require Class 2 DSC and above.
- For Income Tax e-Filing : Class 2 and above

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- For Northern Railway e-Tendering : Class 3
- For IRCTC Purpose e-Ticketing : Class 3

ABOUT MCA21 (Ministry of Corporate Affairs):
An ambitious e-governance project of the Ministry of Company Affairs (MCA), Government of India with MCA21 one would be embarking from paper based environment to a paperless one. Under MCA21 project a new set of e-forms have especially been designed which are freely downloadable in the various format from the MCA Website, www.mca.gov.in, which can be accessed and would enable us 24x7 time zone for filing of the same.

What type of Digital Signature Certificate (DSC) is to be obtained for eFiling on the MCA Portal?
DSC of Class 2 and Class 3 category issued by a licensed Certifying Authority (CA) needs to be obtained for efiling on the MCA Portal.

Who issues the Digital Signature Certificate?
A licensed Certifying Authority (CA) issues the digital signature. Certifying Authority (CA) means a person who has been granted a license to issue a digital signature certificate under Section 24 of the Indian IT-Act 2000.

Cost of obtaining a Digital Signature Certificate
The cost of obtaining a digital signature certificate may vary as there are many entities issuing DSCs and their charges may differ.

Time taken by CAs take to issue a DSC
The time taken by CAs to issue a DSC may vary from three to seven days.

Validity period of a Digital Signature Certificate
The Certifying Authorities are authorized to issue a Digital Signature Certificate with a validity of one or two years.

Compiled by: Brajeswar Pandey

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