

TECHNICAL UPDATE

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The amendments introduced in statutes, policies and procedures in respect of Direct Tax, Indirect Tax, Company Law & Accounting Standards, FEMA / EXIM Policy & SEBI related matters are summarized hereunder

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DIRECT TAX

1. Income earned from an 'Offshore Supply Contract' may not be subject to tax in India

Delhi Income tax appellate tribunal recently held that income accrued from an offshore supply contract cannot be taxed in India, where title of the goods transferred outside India. Tribunal held that where the Indian PE of non-resident had no role to play in offshore supplies, the mere signing of agreement in India did not give rise to any income within India; hence it being not attributable to any operation carried out in India, no portion of the same was taxable in India.

Source – LG Cable Ltd. Vs Deputy Director of Income-tax – (2008) ITAT - Delhi (IT appeal no. 4692 of 2005)

2. Liaison Office of a Japanese Company may not be treated as its PE in India

Kolkata Income Tax Appellate Tribunal recently held that where the liaison offices are not indulging in any other activity other than collecting information and sending the same to principal office which are preparatory and auxiliary in nature, as per the approval granted by the RBI, they cannot be treated as Permanent Establishment ('PE') of the non-resident assessee in India.

Source - Sojitz Corporation Vs ADIT (International Taxation) - (2008) ITAT - Kolkata (IT appeal no. 1252/KOL/2006)

3. Income earned by Non-Residents from Indian referral business may not be taxed in India

Authority for Advance Ruling ('AAR') held that the receipt on account of the referral fee arising to the non-resident Singapore Company would not be taxable in India either under the head business income or royalty income or income by way of fee for technical services. AAR held that in the absence of any fixed place or direct/ intimate relation between Singapore Company and its Indian referral business, it doesn't have any Permanent Establishment ('PE') or Business Connection in India and hence income earned by it cannot be subject to tax in India.

Source - Cushman & Wakefield (S) Pte Ltd, In re (2008) AAR (AAR No. 757 of 2007)

4. Tax liability of a Foreign Company supplying certain Software and Hardware

Authority for Advance Ruling ('AAR') recently held

in the case of an American company that payment received in respect of software and provision of services of installation, testing and training shall be taxable under the IT Act, 1961 read with Double Tax Avoidance Agreement and said payment shall be charged as royalty and fee for technical services respectively at the rate of 10 per cent as per section 115A plus applicable surcharge and education cess.

Source - Airport Authority of India, In re (AAR No. 755-756 of 2007)

5. If Arm's Length remuneration paid to dependent agent, No further attribution of Income to tax in India

Bombay High Court held that once the arm's length remuneration has been paid to a dependent agent in India by any non-resident, no further attribution of income can be made to foreign principal. The Court held that once non-resident have a dependent agent in India, the fiction of a deemed PE is created and if the correct arm's length price is applied and paid, then nothing further would be left to be taxed in the hands of non-resident.

Source - SET Satellite (Singapore) Pte Ltd Vs DCIT (22nd August 2008) - HC (Bombay)

INDIRECT TAX

1. Exemption to the Ultra Mega Power project based on super-critical coal thermal technology

The Central Government has notified that goods required for setting up of an Ultra mega power project based on super-critical coal thermal technology, with the installed capacity of 3960 MW or above will be exempt from excise duty provided the power procurement has been tied up through tariff based competitive bidding.

Source - Notification no.46 dated 14 August 2008

2. Central Government has introduced Custom Tariff (Determination of Origin of Products under the Duty free Tariff Preference Scheme for Least Developed Countries) Rules 2008

The Central Government has introduced Custom Tariff (Determination of Origin of Products under the Duty free tariff preference scheme for Least Developed Countries) Rules, 2008. These rules have been introduced to determine the origin of product that will be eligible for duty free tariff preference

scheme. The rules shall come into force from the date of its publication.

Source: Notification 100 dated August 13, 2008

3. Clarification has been given by the service tax department on some issues raised by the All India Motor Transport Congress (AIMTC)

The All India Motor Transport Congress (AIMTC) has represented to the government regarding the difficulties being faced by the Goods Transport Agency (GTA) in respect of service tax levy on goods transport by road service. In this regard, a joint statement by the government and AIMTC was issued laying down the principles to be followed in respect of the issues raised by AIMTC. The following has been clarified.

Clarifications

- Any ancillary/intermediate services provided in relation to transportation of goods, and the charges, if any, for such services are included in the invoice issued by the GTA, and not by any other person, such service would form part of GTA service and, therefore, the abatement of 75% would be available on it.
- Where service is provided by a person who is registered as GTA service provider and issues consignment note for transportation of goods by road in a goods carriage and the amount charged for the service provided is inclusive of packing, then the service shall be treated as GTA service and not cargo handling service.
- As long as the entire transportation of goods is by road; and the person transporting the goods issues a consignment note, it would be classified as 'GTA Service'

Source: Circular No.104/07/2008-ST dated August 6, 2008

CORPORATE & OTHER LAWS

1. Amalgamation scheme sanctioned, if approved, by transferor and transferee

A scheme of amalgamation between the transferor and the transferee company is sanctioned if approved

by the equity shareholders and secured creditors of the company and also by the Official Liquidator (OL) and Regional Director.

Source: Webneuron Services Ltd. vs Monster.Com India (P) Ltd.

2. No criminal liability if Director resigned before dishonor of cheque

The role of the directors is important in commissioning of the offence. Criminal proceedings initiated against the directors in case non-payment of deposits on maturity and dishonour of cheque not unsustainable in case they cease to be the directors of the company before the event of dishonour of cheques. Just being directors of the company, would not be sufficient, to attach criminal liability.

Source : Ashok Sikka vs State

3. Guidelines for Issue of Compliance Certificate amended

The Institute of Company Secretaries of India has revised the limits for Company Secretaries in practise to sign Annual Returns and to issue Compliance Certificates. Starting January 1, 2008 a company can issue Compliance Certificates and sign Annual Returns for not more than Eighty Companies. For Partnership firms, the limit will be for each partner.

Source : Circular No.104/07/2008-ST dated August 6,2008.

4. Companies Bill introduced in Parliament

The Companies Act, 1956 was reviewed and redrafted in the shape of 'A Concept Paper on New Company Law' which was further amended after inputs were received by the Ministry of Corporate Affairs. The Union Cabinet has finally accorded its approval for introduction of the Companies Bill, 2008 in the Parliament to replace the existing Companies Act, 1956.

The Companies Bill, 2008 seeks to enable the corporate sectors in India to operate in a self regulatory environment with best of international practices. Some of its salient features are –

- Substitution of government control with shareholders control.
- One Person Company (OPC) with speedy incorporation process.

- One director resident in India.
- Recognition to Key Managerial Persons (KMP).
- Single forum for approval of mergers and acquisitions.
- Special courts to deal with offences under the Bill.

Source : Press Information Bureau, dated August 29, 2008.

FEMA & OTHER LAW

1. Investment in Credit Information Companies

RBI has issued a directive that while considering applications for grant of certificate of registration under the Credit Information Companies (Regulation) Act, 2005, it would ensure that no single investor, whether the resident in India or outside India, holds more than 10 per cent of equity capital of any credit information company.

Source: RBI/2008-09/ 107-DNBS (PD) C.C. No. 124/03.05.002/2008-09 dated July 22, 2008

2. Accounting for Taxes on Income—Accounting Standard 22-Treatment of DTA and (DTL) for computation of Capital

RBI has clarified the regulatory treatment for the Deferred Tax Assets (DTA) and Deferred Tax Liabilities (DTL) appearing in the Balance Sheets of NBFCs as:

- DTL account will not be eligible for inclusion in Tier I or Tier II capital for capital adequacy purpose as it is not an eligible item of capital.
- DTA will be treated as an intangible asset and should be deducted from Tier I capital.

Source: RBI/2008-09/ 107-DNBS (PD) C.C. No. 124/03.05.002/2008-09 dated July 31, 2008

3. Project Offices - Foreign Currency Accounts in India AD Category - I banks have been allowed to open an additional foreign currency account for each Project Office subject to:

- the same terms and conditions as applicable to the existing foreign currency account would be applicable to the additional foreign currency account
- both the foreign currency accounts are maintained with the same AD Category – I bank.

Source: RBI/ 2008-09/109 P. (DIR Series) Circular No. 02 dated July 31, 2008

4. Guidelines on trading of Currency futures in Stock Exchanges

RBI has decided to introduce currency futures in recognized stock exchanges or new exchanges recognized by the Securities and Exchange Board of India (SEBI) in the country. The currency futures market would function subject to the directions, guidelines, instructions issued by the Reserve Bank and the SEBI, from time to time.

Source: RBI/2008-09/122 A.P. (DIR Series) Circular No. 05 dated August 06, 2008

5. Introduction of Currency Futures-Permitting Banks to become Trading or Clearing Members of SEBI Approved Exchanges

RBI has decided to permit scheduled commercial banks (AD Category I) to become trading / clearing members of the currency derivatives segment to be set up by the Stock Exchanges recognized by SEBI, subject to their fulfilling the prudential requirements prescribed by RBI.

Source: RBI/2008-09/123 DBOD. No. FSD. BC. 29 / 24.01.001/2008-09 dated August 6, 2008

6. Overseas Direct Investment by Registered Trust or Society

Registered trusts and societies which have set up hospitals in India, have been permitted to make investment in the same sector through a joint venture company or wholly owned subsidiary outside India subject to the approval of the Reserve Bank and fulfilling the eligibility criteria.

Source: RBI/2008-09/128 A. P. (DIR Series) Circular No. 07 dated August 13, 2008

7. Export of goods and services-Direct dispatch of shipping documents realization and repatriation of export proceeds - Liberalisation

With a view to further liberalise the facilities available to the exporters and to simplify the procedure, it has been decided to allow AD Category - I banks, to regularize cases of dispatch of shipping documents by the exporter direct to the consignee or his agent resident in the country of the final destination of goods, up to USD 1 million or its equivalent, per export shipment, subject to the following conditions:

- a) The export proceeds have been realized in full.
- b) The exporter is a regular customer of AD Category - I bank for a period of at least six months.
- c) The exporter's account with the AD Category - I bank is fully compliant with Reserve Bank's extant KYC / AML guidelines.
- d) The AD Category – I bank is satisfied about the bonafides of the transaction.

Source: RBI/2008-09/127 A. P. (DIR Series) Circular No. 06 dated August 13, 2008

8. **Exchange Earner's Foreign Currency (EEFC) Account**
RBI has decided to withdraw the facility of interest income from EEFC account with effect from November 01, 2008. Accordingly, all EEFC accounts shall only be permitted to be opened and maintained in the form of non-interest bearing current accounts.

Source: RBI/2008-09/118 A. P. (DIR Series) Circular No. 04 dated August 04, 2008

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