

# TECHNICAL UPDATE

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The key amendments introduced in statutes, policies and procedures in respect of Direct Tax, Indirect Tax, Corporate Laws & Accounting Standards, Foreign Exchange Management Act / Export Import Policy & Securities and Exchange Board of India related matters are summarized hereunder

## CONTENTS AT A GLANCE

### DIRECT TAX

#### Amendments, Notifications & Court Rulings

- Determination of Nature of Income Arising from Sale of Shares
- Timeshare Fee Taxable Over the Life of Contract
- Tax on Payments to Non Residents to be Withheld When Income Chargeable to Tax
- Fee for Technical Services Taxable in India Even if Rendered Outside India

### INDIRECT TAX

#### Amendments, Notifications & Court Rulings

- Amendment to Central Excise Rules, 2002
- Cenvat Credit Rules, 2004 amended to provide for electronic filing of returns
- Amendment in Delhi Value Added Tax Rules, 2005
- Courier Imports & Exports Regulations, 2010

### CORPORATE LAW

#### Amendments, Notifications & Court Rulings

- Conditions of listing for issuers seeking listing on SME Exchange-Model SME Equity Listing Agreement
- New Form No. 68 inserted for rectification of mistakes with Registrar of Companies.

### FEMA & OTHER LAW

#### Amendments, Notifications & Court Rulings

- Collection of foreign currency denominated cheques
- NBFCs to obtain NOC
- Revised pricing guidelines for transfer of shares
- Release of Foreign Exchange for Visits Abroad
- Collateral free loans limit to MSEs
- NBFC to incorporate clause for finance in Housing Projects
- Rupee Export Credit Interest Rates
- Guidelines on Note Authentication and Fitness Sorting Parameters
- ECB Policy Norms modified for IFCs
- FDI in manufacturing of Cigars, cigarettes prohibited

### DIRECT TAX

#### 1. Determination of Nature of Income Arising from Sale of Shares

The assessee was engaged in the business of providing management consultancy and investment advisory services. During the relevant financial year, it earned income from sale of shares and earned capital gains. The assessing officer held the same as business income. On appeal, the tribunal relying upon an earlier ruling in the case of CIT vs Associated Industrial Development Co (P) Ltd (82 ITR 586) and CBDT circular number 4/2007, held the income as capital gains since the shares were shown as investments, held for long duration and brought from funds owned by the assessee.

*Source ADIT Management Structure and Systems (P) Ltd. vs ITO (ITA No. 6966/MUM/2007, ITAT Mumbai)*

#### 2. Timeshare Fee Taxable Over the Life of Contract

The assessee granted membership rights in respect of resorts owned/leased by it for a period of 33/25

years. 40 percent of the income in respect of such membership rights was recognized in the first year and balance income was spread over the balance period of the contract. The assessing officer contended that 100 percent of such income accrued in the first year itself as the Income Tax Act, 1961 ('the Act') does not recognize the concept of deferred income.

On appeal the tribunal held that in order that income can accrue to the recipient, it is necessary that the assessee contributes to its accruing by rendering services or otherwise. In other words, an income generating activity is necessary to accrue income in the hands of the taxpayer. In the instant case, the tribunal observed that the assessee had not rendered the entire set of services in the first year. Accordingly, it held that the whole of such income from the granting of membership rights cannot be recognized in the first year and is to be spread over the term of the contract.

*Source ACIT vs Mahindra Holidays & Resorts (India) Ltd. (ITA Nos. 2412 to 2416/Mds/2005, ITAT Chennai)*

### 3. Tax on Payments to Non Residents to be Withheld When Income Chargeable to Tax

The Punjab & Haryana High Court relying upon the landmark judgment of the apex court in The assessee made certain payments to a non-resident without withholding tax on the same since the payments were not liable to tax in India. The assessing officer disallowed the same under section 40(a)(ia) of the Act on account of failure to deduct tax. On appeal, the Delhi High Court relying upon its earlier judgment in the case of Van Oord ACZ India (P) Ltd (189 Taxman 232), held that the liability to withhold tax on payments non-residents arises only if the payment is chargeable to tax in India

*Source Maharishi Housing Development Finance Corporation Ltd v ACIT (ITA no 222 of 2009, Delhi)*

### 4. Fee for Technical Services Taxable in India Even if Rendered Outside India

The assessee, an Indian company, availed technical services from a Chinese company. The services were rendered in China and therefore the assessee contended that the same is not chargeable to tax in India and hence no tax is deductible on the same. The assessee relied upon the judgment of the apex court in the case of Ishikawajima Harima (288 ITR

408) wherein it was held that for the income to be taxable in India, the services have to be rendered in India as well as utilized in India. The tribunal however, held that after the amendment brought in by Finance Act 2010, the above position stands amended. The tribunal clarified that it is no longer a necessity that in order to be taxable, the services must also be rendered in India. It is sufficient if the services are utilized in India. The payment towards technical services in the instant case is therefore liable to be taxed in India in terms of the domestic tax provisions. As regards the provisions of the treaty, the tribunal held that as per the Indo-China Double taxation Avoidance Agreement ('DTAA'), the services are deemed to accrue in the country of which the payer is the resident. Hence, in the instant case the payment was deemed to accrue in India even in terms of DTAA. The tribunal therefore held that the said payment is taxable in India, both in terms of domestic tax legislation and the relevant DTAA.

*Source Ashapura Minichem Limited vs ADIT (ITA No. 2508/Mum/08, ITAT Mumbai)*

## INDIRECT TAX

### 1. Amendment to Central Excise Rules, 2002

The Central Excise Rules have been amended to provide for filing of Annual Financial Information Statement, if an assessee has paid a total duty of Rs 10 lakhs or more including the amount of duty paid by utilization of CENVAT credit in the preceding financial year, with effect from June 1, 2010. Moreover returns by 100% Export Oriented Undertakings (EOU) has been provided for.

*Source: Notification No.20/2010-Central Excise (N.T.), dated May 18, 2010*

### 2. Cenvat Credit Rules, 2004 amended to provide for electronic filing of returns

Cenvat Credit Rules, 2004 have been amended to provide for electronic filing of returns by a first and second stage dealer, and by a manufacturer of final products who paid the duty of Rs 10 lakhs or more including the amount of duty paid by utilization of CENVAT credit in the preceding financial year, with effect from June 1, 2010.

*Source: Notification No.21/2010-Central Excise (N.T.), dated May 18, 2010*

- 3. Amendment in Delhi Value Added Tax Rules, 2005**  
Form 16 of DVAT Return has been amended to include Annexure 2A (Summary of purchase / inward branch transfer register-monthwise) & Annexure 2B (Summary of sale / outward branch transfer register-monthwise)

*Source: Notification No. F.3 (27)/Fin. (T&E)/2009-10/ASF/99, dated May 07, 2010*

- 4. Courier Imports & Exports Regulations, 2010**  
The Central Board of Excise and Customs has come out with a new regulation called Courier Imports & Exports (Electronic Declaration and Processing) Regulations, 2010. These Regulations shall be applicable for assessment and clearance of imported or export goods, carried by an authorised courier by air, on behalf of a consignee or consignor at such customs airports in such form and to such extent as the Board may notify subsequently.

*Source: Notification No.36/ 2010-Customs (N.T.), dated May 05, 2010*

## CORPORATE & OTHER LAWS

- 1. Conditions of listing for issuers seeking listing on SME Exchange-Model SME Equity Listing Agreement**

In order to enable Small and Medium Enterprises to raise finance through Capital Market, SEBI has decided to encourage promotion of dedicated exchanges and/or dedicated platforms of the exchanges for listing and trading of securities issued by Small and Medium Enterprises ("SME"). In continuation of the same and to facilitate listing of specified securities in the SME exchange, "Model Equity Listing Agreement" to be executed between the issuer and the Stock Exchange, to list/migrate the specified securities on SME Exchange.

Certain relaxations are provided to the issuers whose securities are listed on SME exchange in comparison to the listing requirements in Main Board.

A glimpse of few relaxations is as under:

- (i) Companies listed on the SME exchange may send to their shareholders, a statement containing the salient features of all the documents, as prescribed in sub-clause (iv) of clause (b) of

proviso to section 219 of the Companies Act, 1956, instead of sending a full Annual Report;

- (ii) Periodical financial results may be submitted on "half yearly basis", instead of "quarterly basis" and
- (iii) SMEs need not publish their financial results, as required in the Main Board and can make it available on their website.

*Source: SEBI Circular No. CIR-CFD-DIL-6-2010 dated 17 May 2010*

- 2. Companies (Central Government's) General Rules and Forms (Second Amendment), 2010 -New Form No. 68 inserted.**

Ministry of Corporate Affairs vide notification no. G.S.R 177 (E) dated March 05, 2010, have inserted the new e-form 68: This form can be filed for the following purpose:

- Rectification of mistakes in the e-form 1A, e-form 1 and e-form 44 filed with Registrar of Companies
- Rectification of mistake is allowed only once in respect of the company.

*Source: MCA/G.S.R.177 (E) dated 05 March 2010*

## FEMA

- 1. Collection of foreign currency denominated cheques**

Reserve Bank of India ('RBI') has advised banks to extend customer friendly arrangement for collection of cheques denominated in any foreign currency other than US Dollar denominated cheques. This step has been undertaken after observing improvements in customer services.

*Source: RBI/2009-10/438 UBD BPD (PCB) Cir. No.3/16.26.000/2009-10 dated April 30, 2010*

- 2. NBFCs to obtain NOC**

RBI has directed Non Banking Financial Companies ('NBFCs') to obtain No Objection Certificate ('NOC') of the Department of Non-Banking Supervision of RBI before making any overseas investments. Any investments made by NBFCs without regulatory clearance is a violation of FEMA 2004 and attract penal provisions. RBI also directed that applications in this regard shall clearly state the activities intended to be undertaken by the overseas entity

*Source: RBI/2009-10/442 DNBS (PD). CC. No.173/03.10.01/2009-10 dated May 03, 2010*

### 3. Revised pricing guidelines for transfer of shares

RBI has revised the pricing guidelines in relation to the transfer or issue of Security by a person resident outside India. As per the revised guidelines, the valuation of shares for transfer shall now be arrived at as per the Discounted Cash Flow Method ('DCF') with effect from May 4, 2010 as compared to the Comptroller of Capital Issues ('CCI') guidelines used earlier.

*Source: RBI/2009-10/445 A. P. (DIR Series) Circular No.49 dated May 04, 2010*

### 4. Release of Foreign Exchange for Visits Abroad

RBI has revised the ceiling for release of foreign exchange in the form foreign currency notes and coins from USD 2,000 to USD 3,000 to the travelers proceeding countries other than Iraq, Libya, Islamic Republic of Iran, Russian Federation and other Republics of Commonwealth of Independent States. However, Authorised Dealers ('ADs') may continue to sell foreign exchange up to USD 5,000 to the travelers proceeding to Iraq or Libya and full foreign exchange to travelers proceeding to the Islamic Republic of Iran, Russian Federation and other Republics of Commonwealth of Independent States.

*Source: RBI/2009-10/446 A.P. (DIR Series) Circular No. 50 A.P. (FL Series) Circular No. 7 dated May 4, 2010*

### 5. Collateral free loans limit to MSEs

Working group constituted by the RBI to review the Credit Guarantee Scheme ('CGS') of the Credit Guarantee Fund Trust for Micro and Small Enterprises ('MSE') has enhanced the limit for collateral free loans to the MSE from Rs. 5 lakh to Rs.10 lakh and it be made mandatory for banks. Banks, in turn, can take cover for the collateral free credit facilities under CGS.

*Source: RBI/2009-10/449 RPCD. SME & NFS BC No. 79 / 06.02.31/2009-10 dated May 6, 2010*

### 6. NBFC to incorporate clause for finance in Housing Projects

NBFCs granting finance to housing or development projects have been directed by RBI to stipulate the following as a part of the terms and conditions that

- (i) The builder or developer or owner or company would disclose in the Pamphlets or Brochures or advertisements etc., the name(s) of the entity

to which the property is mortgaged.

- (ii) The builder or developer or owner or company should indicate in the pamphlets or brochures, that they would provide No Objection Certificate (NOC) or permission of the mortgagee entity for sale of flats or property, if required.

*Source: RBI/2009-10/450 DNBS (PD) C.C No. 174 / 03.10.001/2009-10 dated May 6, 2010*

### 7. Rupee Export Credit Interest Rates

RBI has extended the validity of the prescribed interest rate ceiling on pre-shipment rupee export credit upto 270 days and post-shipment rupee export credit upto 180 days stipulated at BPLR minus 2.5 percentage points upto June 30, 2010. The Base Rate System will be applicable with effect from July 1, 2010. Accordingly, interest rates applicable for all tenors of rupee export credit advances will be at or above Base Rate.

*Source: RBI/2009-10/453 DBOD. Dir (Exp) BC No. 102 / 04.02.001/2009-10 dated May 6, 2010*

### 8. Guidelines on Note Authentication and Fitness Sorting Parameters

RBI has finalized the draft guidelines on "Note Authentication & Fitness Sorting Parameters" for its implementation with immediate effect relating to machines installed by banks for processing banknotes to conform with the standards / parameters prescribed by RBI after taking into account comments received from various stakeholders including banks, equipment manufacturers and members of public.

*Source: RBI/2009-10/459 DCM (R&D)No.G-26/18.00.14/ 2009-10 dated May 11, 2010*

### 9. ECB Policy Norms modified for IFCs

RBI has decided to modify the External Commercial Borrowing ('ECB') norms in respect to IFCs. IFCs have been permitted to avail of ECBs, including the outstanding ECBs, up to 50 per cent of their owned funds under the automatic route. ECBs by IFCs above 50 per cent of their owned funds would require approval of RBI and will, therefore, be considered under the approval route.

*Source: RBI/2009-10/456 A. P. (DIR Series) Circular No. 51 dated May 11, 2010*

## 10. FDI in manufacturing of Cigars, cigarettes prohibited

Department of Industrial Policy & Promotion ('DIPP') has reviewed the Foreign Direct Investment ('FDI') Policy prohibiting FDI in manufacture of 'Cigars, cheroots, cigarillos and cigarettes, of tobacco or tobacco substitutes' and has decided to include the activity in the list of activities/ sectors prohibited for FDI.

*Source: Circular No. 2 (2010 series), D/o IPP F. No. 5(10) 2008-FC dated May 10, 2010*

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