

# 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. Taxability of Interest Income arising from NRO Account held by Non-Resident Indians

Where Non Resident Indians ('NRIs') have NRO accounts with State Bank of India (SBI) and now intend to return to India for indefinite period, the Authority for Advance Ruling ('AAR') held that NRO accounts opened by applicant in SBI would be specified assets and interest arising there from would be taxable at concessional rate of 20 per cent as specified in section 115E of the Income tax Act. AAR also held that after applicant becomes resident on his return in India, he can continue to avail concessional rate of tax of 20 per cent on such income until NRO account is converted into rupee account.

*Source - Dr Virindra Kumar Raina, In re - (2009) AAR (176 TAXMAN 222)*

#### 2. Inclusion of Income of a Non-Resident in a Previous Year on Accrual Basis

The High Court of Punjab & Haryana held that the provision of section 5(2) of Income-tax Act leaves no room for any doubt or ambiguity, that if an effective and final conclusion can be drawn, on the issue of accrual of income to a non-resident, the actual date of receipt is inconsequential.

*Source - Smt Trishla Jain Vs Commissioner of Income-tax (2009) High Court (P&H) (ITR nos. 43 to 48 of 1991)*

### 3. Pre-requisites of a Genuine Gift Transaction

Lucknow Bench of Income Tax Appellate Tribunal ('Tribunal') held that merely on filing of documents showing the form of the transactions such as affidavits, deeds, statements and transactions of gift through banking channels, it cannot be said that in substance, the gifts are acceptable. The Tribunal held that surrounding circumstances, human probabilities and reality of human life are to be considered for determining genuineness of the gifts. It further held that the realities of human life in which a person would be motivated to give gift to another includes the relationship between the donors and the donees, and emotional bondages, reciprocity showing that the two sides, in normal course, exchanging gifts of similar amounts on different occasions.

*Source - Krishna Mohan Agrawal Vs ITO - (2008) ITAT (Lucknow) [IT Appeal no. 811 of 2005]*

### 4. Nature of Payments made for availing Bandwidth Network and Operating Infrastructure Services

Mumbai Bench of Income Tax Appellate Tribunal ('Tribunal') held that when the assessee has availed the bandwidth services and other infrastructure for providing the internet access to its customers, the payment made by the assessee to service providers for availing the services of the bandwidth network infrastructure cannot be said to be technical services within the meaning of section 194J read with Explanation 2 to clause (vii) of section 9(1) of the Income-tax Act.

*Source - Pacific Internet (India) Pvt Ltd Vs ITO - (2008) ITAT (Mumbai) [IT Appeal nos. 1607 to 1609/Mum/06]*

### 5. Expenditure incurred in relation to Tax Free Income

As per provisions of section 14A, only expenditure which has been proved to be incurred in relation to earning of tax free income can be disallowed. The section cannot be extended to disallow even expenditure which is assumed to have been incurred for earning tax free income. Therefore, common expenditure incurred cannot be broken artificially to attribute for apportioning a part thereof to earning of tax free income on assumption that such part of common expenditure was incurred in relation to tax free income.

*Source - DLF Ltd Vs Commissioner of Income-tax - (2009) ITAT (Delhi) (27 SOT 22)*

### 6. Mumbai ITAT (Special Bench) on the Scope of Section 14A

Hon'ble Special Bench of Mumbai Income Tax Appellate Tribunal ('Tribunal') held that in view of specific provisions of section 14A, expenses falling under any head or section which are otherwise deductible as business expenditure or under other heads, would call for disallowance to extent those expenses have been incurred in relation to income exempt from tax. Tribunal also held that for purpose of section 14A, what is relevant is to work out expenditure in relation to exempt income and not to examine whether expenditure incurred by assessee has resulted into exempt income or taxable income. The intention behind using expression 'in relation to' in section 14A is to encompass not only direct, but, also indirect expenditure which has any relation to exempt income and, therefore, all direct and indirect expenses are disallowable under section 14A, which have any relation with tax free incomes.

*Source - Income-tax Officer Vs Daga Capital Management (P) Ltd - (2008) ITAT (Mumbai-Special Bench) (26 SOT 603)*

## INDIRECT TAX

### 1. Applicability of service tax on construction of Residential Complex

Service tax is applicable in case services are provided in relation to construction of complex in including new residential complex. However Central Board of Excise and Customs ('CBEC') has issued a clarification stating that service tax shall not be applicable where the builder/developer/promoter enters into an 'agreement to sell' and receives construction linked payments. The ownership only gets transferred once the sales deed is executed which is done after the completion of construction and till such time the builder/developer/promoter remains the owner of the property. The construction activity is therefore in the nature of 'self service' and hence does not attract service tax.

*Source - Circular No. 108/02/2009 - ST*

### 2. Exemption for service providers to Goods Transport Agency

Certain services provided by any person to a Goods Transport Agency ('GTA') have been exempted from

service tax, provided such services are used in providing services in relation to transport of goods by road. Following are the services which have been exempted

- i. Clearing and forwarding services
- ii. Recruitment or supply of manpower
- iii. Cargo handling services
- iv. Storage and warehousing of goods
- v. Business auxiliary services
- vi. Packing activity
- vii. Support Services of business or commerce
- viii. Services in relation to supply of tangible goods including machinery, equipment and appliances

*Source – Notification No. 1/2009-Service Tax*

### 3. Applicability of service tax on Educational Institutes

Services of commercial training or coaching centre are within the ambit of service tax under the head 'commercial training or coaching center'. The CBEC has clarified that it is not essential for such an institute to have profit making intent for being liable to collect and deposit service tax, i.e. even those institutes which do not have a profit earning motive are liable to pay service tax. The word 'Commercial' has reference to the activity of training or coaching and not to the nature or activity of the institute providing the training or coaching.

*Source - Circular No. 107/01/2009 - ST*

## CORPORATE & OTHER LAWS

### 1. Amendment in E-Forms:

E-Forms 1, 1A, 2, 5, 23B have been revised w.e.f January 11, 2008 vide Notification No. 824(E) and 868(E) dated November 28, 2008 and December 22, 2008.

E-Forms 21, 23 have been revised vide Notification No. 872(E) dated December 23, 2008 w.e.f February 15, 2008.

New E-Form 67 is inserted for adding any addendum or rectifies any mistake of previous form filed with

MCA vide Notification No.: 876(E). This e-form is effective from February 15, 2008.

Procedure for acceptance or rejection of any application/e-form has been prescribed for ROC vide Notification No.: 888(E)

*Source: Ministry of Corporate Affairs*

### 2. Appointment of a Company Secretary

The Central Government has issued a notification on namely 'Appointment of a Company Secretary u/s 383A of Companies Act, 1956', which has bearing on the existing law. The main contents of this notification and its implications are discussed below.

- A company having a paid-up share capital of less than Rs. 1 million is neither required to employ a full time Company Secretary nor required to obtain a Compliance Certificate.
- A company with a paid-up share capital of Rs. 1 million or more but less than Rs. 20 million is compulsorily required to obtain Compliance Certificate irrespective of whether a company has a full time Company Secretary.
- A company with a paid-up share capital of Rs. 20 million or more but less than Rs. 50 million, may either employ a full time Company Secretary or obtain a Compliance Certificate.
- A company with a paid-up share capital of Rs. 50 million or more is compulsorily required to employ a full time Company Secretary.

*Source: Notification No.: G.S.R 11(E) dated 05-01-2009*

### 3. Renewal of Recognition of Vadodara Stock Exchange Limited

The Securities and Exchange Board of India (SEBI), having considered the application for renewal of recognition made under section 3 of the Securities Contracts (Regulation) Act, 1956 by Vadodara Stock Exchange Limited, SEBI accepted renewal of recognition to the said Exchange under section 4 of the said Act for a period of one year commencing on the 4th day of January, 2009 and ending on 3rd day of January, 2010 in respect of contracts in securities subject to the conditions as may be prescribed or imposed hereafter.

*Source: Notification No. LAD-NRO/GN/2008/31/149198, dated 2-1-2009*

## FEMA

### 1. External Commercial Borrowings (ECB) Policy - Liberalization

RBI has decided to dispense with the requirement of all-in-cost ceiling on ECB until June 30, 2009.

Accordingly, eligible borrowers proposing to avail of ECB beyond the permissible all-in-cost ceilings may approach the RBI under the approval route.

*Source: RBI/2008-09/343 A.P. (DIR Series) Circular No. 46 dated January 02, 2009*

### 2. Internal assignments in banks by Statutory Auditors

RBI has clarified that the audit firms would not undertake statutory audit assignment while they are associated with internal assignments in the bank during the same year. In case the firms are associated with internal assignment they should relinquish the internal assignment before accepting the statutory audit assignment for that year.

*Source: RBI/2008-09/ 335 Ref. DBS. ARS. No. BC. 02/ 08.91.001/ 2008-09 dated December 31, 2008*

### 3. Collateral Free loans-Micro and Small Enterprises

RBI has reiterated that banks may extend collateral-free loans to the MSE sector (both manufacturing and service enterprises) up to Rs. 5 lakhs and the same is applicable to all the new loans.

*Source: RBI/2008-09/352 RPCD. SME & NFS. BC. No 84A / 06.02.31 (P)/2008-09 dated January 20, 2009*

4. Regulation of excessive interest charged by NBFCs  
RBI has issued directions to NBFCs for determination of interest rates and processing and other charges taking into account factors such as, cost of funds, margin and risk premium, etc. Such rates are required to be made available on the web-site of the companies or to be published in the relevant newspapers. The rate of interest should be annualised rates so that the borrower is aware of the exact rates that would be charged to the account.

*Source: RBI notification No. RBI/2008-09/337DNBS (PD) C.C. No. 133 /03.10.001/2008-09 dated January 2, 2009*

### 5. Settlement system under ACU Mechanism

RBI has notified that the participants in the Asian Clearing Union (ACU) will have the option to settle their transactions either in ACU Dollar or in ACU Euro. Accordingly, the Asian Monetary Unit (AMU) shall be denominated as 'ACU Dollar' and 'ACU Euro' which shall be equivalent in value to one US Dollar and one Euro, respectively. Further, AD Category - I banks would be allowed to open and maintain ACU Dollar and ACU Euro accounts with their correspondent banks in other participating countries and all eligible payments would be settled by the concerned banks through these accounts.

*Source: RBI notification no. RBI/2008-09/332 A. P. (DIR Series) Circular No. 43 dated December 26, 2008*

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