

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. **Payment made by a company out of its share premium account cannot be treated as deemed dividend under section 2(22)(e)**

As per the provisions of Section 78 of the Companies Act the amount appearing in the share premium account is not eligible for distribution as dividend to the share holders of the company. Therefore any sum advanced by a company to its shareholder cannot be taxed as deemed dividend under section 2(22)(e) of the Income Tax Act, if such sum was paid out of the share premium account.

Source – MAIPO India Limited. Vs Deputy Commissioner of Income-tax – (2008) ITAT - Delhi (IT appeal no. 2266 of 2005)

2. **Provisions of Section 43B not to apply for liabilities in respect of service tax not realised till the end of the year**

The Chennai Income Tax Appellate Tribunal held that addition on account of non payment of service

tax under section 43B cannot be made in respect of so much of amount of service tax as was pertaining to consideration not realised till the end of the previous year since the liability to pay service tax arises on realisation of amount towards services rendered.

Source – Real Image Media Technologies Private Limited Vs Deputy Commissioner of Income-tax – (2008) ITAT - Chennai

Note – With effect from May 2008, service tax in respect of services rendered to an associated enterprises is payable at the time of making entry in the books of accounts, therefore section 43B shall be applicable in respect of such services.

3. Double Taxation Relief

Where a double taxation avoidance agreement entered into by Indian government provides that any income of a resident of India 'may be taxed' in other country, such income shall be included in the total income chargeable to tax in India and relief is to be granted in accordance with the method provided in the double taxation avoidance agreement.

Source – Notification No. 91/2008, dated August 28, 2008

4. An Un-incorporated joint venture may be taxed as an Association of Persons ('AOP')

Where an un-incorporated joint venture ('JV') was formed by means of a Joint Venture agreement between a foreign company and two Indian companies for the execution of a common project and the JV partners were jointly and severally liable to the client for obligations under the contract, it was held by the Authority for Advance Ruling that such a JV constitutes an AOP and should be taxed as such.

Source – Geoconsult ZT GmbH, In re (2008) AAR (AAR No. 745 of 2007)

5. Deemed Accrual of Income

In case of an Indian company engaged in 'call centre and data processing activities' which entered into an agreement with a foreign company under which the foreign company provides the Indian company with transmission of voice through telecom bandwidth, it was held by the Authority for Advance Rulings ('AAR') that by availing of transmission facility there is no usage of equipment by the Indian company rather it is a case of the foreign company using its

own network and providing services and therefore cannot be categorized as royalty under Section 9 of the Income Tax Act.

Source – Dell International Services India Private Limited, In re (2008) AAR (AAR No. 735 of 2006)

INDIRECT TAX

1. Issue of installation certificate for capital goods imported, procured locally under EPCG scheme

On installation of capital goods in the factory premises of the authorization holder or his supporting manufacturer under the EPCG Scheme an installation certificate has to be obtained from the Central Excise Authority confirming installation of capital goods at the factory premises of the authorization holder within six months from the date of completion of imports.

Source – Customs Circular no.14 dated September 26, 2008

2. Amendments to rates of exchange of specified foreign currencies

The Central Board of Excise and Customs has made changes to the exchange rate of Hong Kong Dollar and Japanese Yen to be used for valuation of goods for the purpose of levy of Customs Duty.

Source: Customs Notification No. 110 dated September 25, 2008

3. Admissibility of CENVAT Credit on construction services used by a manufacturer

Services for the construction of residential quarters do not pertain, directly or indirectly to the manufacture and clearance of yarn. Hence the same is outside the purview of the basic definition of input services. So construction services used for construction of residential quarters even within the factory premises would not be regarded as input services for the purpose of admissibility of Cenvat Credit.

Source: Advance Ruling in the matter of M/s VMT Spinning Company Limited Himachal Pradesh (2008-TIOL-05-ARA-CX)

CORPORATE & OTHER LAWS

1. E forms for filing with Ministry of Corporate Affairs revised

Ministry of Corporate Affairs revised e-forms namely Form 20B, 21A, 23AC & 23ACA *vide* Circular

No.G.S.R. 655 (E) dated September 12, 2008. These forms are available on MCA portal w.e.f. September 28, 2008.

New version of modified attachments to 23AC, Form 60, DIN 3, Form 1A, Form 1, Form 18 & Form 32 are also amended. It is advised to use the new version as the current version has now been discontinued.

Source: Gazette of India, Part-II, Section 3, Sub-section 1, dated September 12, 2008

2. MCA for speedy notifications on derivatives

In order to give transparency in the working of the company in disclosures in their account books, the Ministry of Corporate Affairs has asked the National Advisory Committee on Accounting Standards ('NACAS') to speed up the work on the notifications of AS 30, 31 and 32. These accounting standards will become mandatory after 2011 and it will be compulsory for the companies to make disclosure in their financial statements.

Source: icai.org/resource_file/132003.jpg

3. SEBI to extend ASBA facility to rights issue

The Securities and Exchange Board of India has decided to extend the 'Applications Supported by Blocked Amount' ('ASBA') facility to rights issue. This facility was introduced recently to help investors to get faster refunds in case of non-allotment of shares in IPOs. The ASBA facility co-exists with the current process wherein cheques/ demand draft are used as mode of payment.

According to SEBI, the shareholder of the issuer company should hold the shares in dematerialized ('demat') form in order to apply through the ASBA method.

Source: The Economic Times dated September 25, 2008

FEMA & OTHER LAW

1. Extension of Banking Services - Section 25 Companies

RBI has notified that banks can engage companies registered under Section 25 of the Companies Act, 1956, as Business Correspondents provided that such

companies are stand-alone entities or in which NBFCs, banks, telecom companies and other corporate entities or their holding companies do not have equity holdings in excess of 10 per cent.

Source: RBI/2008-2009/141 DBOD.No.BL.BC. 35/22.01.009/ 2008-2009 dated August 27, 2008

2. Import of Platinum / Palladium / Rhodium / Silver

RBI has decided that Suppliers' and Buyers' credit, including the usance period of Letters of Credit opened for import of Platinum, Palladium, Rhodium and Silver should not exceed 90 days from the date of shipment and AD Category – I banks should ensure that due diligence is undertaken and Know-Your-Customer ('KYC') norms and Anti-Money Laundering (AML) guidelines, issued by the Reserve Bank are followed while undertaking import of these metals. Further, any large or abnormal increase in the volume of business should be closely examined to ensure that the transactions are bonafide and are not intended for interest/ currency arbitrage.

Source: RBI/2008-09/147 A. P. (DIR Series) Circular No. 12 dated August 28, 2008

3. Direct Receipt of Import Bills / Documents - Liberalisation

AD Category - I banks have been permitted to make remittances for imports, where the import bills and documents have been received directly by the importer from the overseas supplier and the value of import bill does not exceed USD 300,000 (which was earlier USD 100,000) subject to the conditions issued by Reserve Bank of India.

Source: RBI/2008-09/149 A. P. (DIR Series) Circular No. 13 dated September 1, 2008

4. Overseas Investment – Rationalisation

RBI has decided that documents evidencing investment in the foreign entity shall be submitted to and retained by the designated AD Category – I bank (earlier Reserve Bank of India), who would be required to monitor the receipt of such documents and verify the bonafides of the documents so received. A certificate to this effect should be submitted by the designated AD Category – I bank to the RBI.

Source: RBI/2008-09/155 A. P. (DIR Series) Circular No. 14 dated September 5

5. Advance Remittances for Import of Services

RBI has raised the limit of USD 100,000 to USD 500,000 or its equivalent for advance remittance for all admissible current account transactions for import of services without bank guarantee.

Source: RBI/2008-09/158 A.P. (DIR Series) Circular No. dated September 08, 2008

6. External Commercial Borrowings (ECBs) Policy – Liberalisation

RBI has raised the existing limit to avail ECB up to USD 100 million to USD 500 million per financial

year for the borrowers in the Infrastructure sector for Rupee expenditure under the Approval Route. ECBs in excess of USD 100 million for Rupee expenditure should have a minimum average maturity period of 7 years.

Source: RBI/2008-09/ 190 A. P. (DIR Series) Circular No. 16 dated September 22, 2008

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