

TECHNICAL UPDATE

December 2011

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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

- Short Deduction of TDS on Non-resident Payments Not to Result in Expense Disallowance
- TPO Can Only Review Transactions Referred by AO

INDIRECT TAX

Amendments, Notifications & Court Rulings

- Amendment in Service Tax Rules, 1994
- Amendment in Rule 18 and Rule 19 of Central Excise Rules, 2002
- Availability of Service tax credit
- Due date for filing of half yearly service tax return extended

FEMA & OTHER LAWS

Amendments, Notifications & Court Rulings

- Revision in All-In-Cost Ceiling - External Commercial Borrowings ('ECB')
- External Commercial Borrowings (ECB) Policy – Parking of ECB proceeds
- Foreign Direct Investment in Pharmaceuticals Sector - Amendment
- Issue of equity shares under the Government route
- Delegation of compounding powers under FEMA to Regional Offices

- Introduction of New Category of NBFCs - 'Non Banking Financial Company-Micro Finance Institutions' (NBFC-MFIs)
- External Commercial Borrowings (ECB) for Micro Finance Institutions (MFIs) and Non-Government Organisations (NGOs) - engaged in micro finance activities under Automatic Route

CORPORATE LAW

Amendments, Notifications & Court Rulings

- Extension of timeline for PAN Based DIN
- Company Law Settlement Scheme (CLSS, 2011) extended

DIRECT TAX

1. **Short Deduction of TDS on Non-resident Payments Not to Result in Expense Disallowance**
The tax payer entered into a technical know-how agreement with AB Sandwik Coromant, Sweden for a period of 5 years for a fee payable in 5 equal installments. The tax payer credited the entire technical fee in its books of accounts in the first year and deducted & deposited tax at source on the entire amount. In the fourth year (relevant year), the tax payer claimed fourth installment of Rs 4.3mn including exchange loss of Rs 0.89mn as deductible expenditure. The AO disallowed the claim of exchange loss as the tax at source was not withheld of the enhanced amount of Rs 0.89mn. The CIT-A confirmed the view taken by AO. On appeal, the ITAT observed that foreign exchange fluctuations increase the cost of the payer but provides no additional benefit to the recipient and thus tax payer had correctly discharged its tax withholding liability. It was further observed that disallowance of payment to non-resident can only be made if no deduction of tax has been made. In other

words, short deduction of tax will not result into disallowance of such expenditure to the tax payer.

Source: Sandvik Asia Ltd vs JCIT (ITA No. 758/PN/99)

2. TPO Can Only Review Transactions Referred by AO

The tax payer was engaged in the business of providing data processing and related services to its Associated Enterprises ('AEs'). On a reference made by the AO, TPO while accepting the ALP of the referred transactions, made adjustments on account of excess advertisement, marketing and promotion expenses incurred by taxpayer. The view of TPO was affirmed by DRP. Being aggrieved, the tax payer filed an appeal before the Tribunal. Keeping in view the provisions under law and the CBDT instructions, the Tribunal ruled that TPO is empowered to determine the ALP only in respect of the 'referred' international transactions and a fresh reference from the AO needs to be sought with regard to the new transactions discovered by the TPO. On further appeal by the Revenue, Delhi High Court held that the role of the TPO is restricted to determining the ALP in relation to only those international transactions which have been specifically referred to him by the AO. It was further held that the introduction of Section 92CA(2A) of the Act is prospective in nature.

Source: CIT vs Amadeus India Pvt Ltd [TS-693-HC-2011(DEL)]

Legends

Act – Income-tax Act, 1961

u/s – Under section

ALP – Arms Length Price

AO – Assessing Officer

CIT (A) – Commissioner of Income Tax (Appeals)

ITAT – Income Tax Appellate Tribunal

INDIRECT TAX

1. Amendment in Service Tax Rules, 1994

CBEC has specified that certain documents are required to be submitted within a period of 15 days from the date of filing of the application for

registration. Failure to do so would lead to rejection of application. The prescribed documents are:

- a. Copy of Permanent Account Number (PAN)
- b. Proof of Residence
- c. Constitution of the Applicant
- d. Power of Attorney in respect of authorised person (s)

Source: Circular No. 15 of 2011-12 dated November 21, 2011

2. Amendment in Rule 18 and Rule 19 of Central Excise Rules, 2002

Following amendments are effective from March 01, 2012:

- a) Rule 18 of Central Excise Rules, 2002: Rebate of excise duty on goods exported to Nepal can be claimed.
- b) Rule 19 of Central Excise Rules, 2002: Goods can be exported to Nepal without payment of duty.

Source: Notification No 24/2011 to 29/2011 dated December 05, 2011

3. Availability of Service tax credit

In recent judgment, it was held that credit of service tax can be available:

- a. For input services received prior to service tax registration
- b. For invoices issued without registration number before registration.

Source: Imagination Technologies India Pvt. Ltd. vs. Commissioner of Central Excise, Pune-III (2011 (23) S.T.R. 661 Tribunal Mumbai)

4. Due date for filing of half-yearly service tax return extended

CBEC has extended the due date for filing of half yearly service tax return for the period April 1, 2011 to September 30, 2011 from December 26, 2011 to January 06, 2012.

Source: Order No 03/2011-ST dated December 29, 2011

FEMA & OTHER LAWS

1. Revision in All-In-Cost Ceiling - External Commercial Borrowings ('ECB')

RBI has revised the all-in-cost ceiling for ECB having average maturity period of three to five years from 300 to 350 basis points. Such enhancement is effective up to March 31, 2012.

Source: RBI/2011-12/273 A.P. (DIR Series) Circular No. 51 dated November 23, 2011

2. External Commercial Borrowings (ECB) Policy – Parking of ECB proceeds

RBI has directed that eligible borrowers would henceforth transfer immediately ECB proceeds raised abroad meant for Rupee expenditure in India for credit to their Rupee accounts with AD Category I banks in India and those meant for foreign currency expenditure could be retained abroad pending utilization.

Source: RBI/2011-12/274 A.P. (DIR Series) Circular No. 52 dated November 23, 2011

3. Foreign Direct Investment in Pharmaceuticals Sector - Amendment

RBI has decided to allow 100 per cent Foreign Direct Investments ('FDI') in brown-field investment in the pharmaceutical sector under the Government Approval route.

Source: RBI/2011-12/296 A.P. (DIR Series) Circular No.56 dated December 09, 2011

4. Issue of equity shares under the Government route

RBI has revised conditions related to issue of equity shares/ preference shares under the government route by conversion of import of capital goods, / machineries / equipments (including second-hand machineries) and pre-operative / pre-incorporation expenses (including payments of rent, etc.)

Subject	Earlier condition	Revised condition
Conversions of import payables for capital goods into FDI	Conversions to be completed within 180 days from the date of shipment of goods.	Applications to be made within 180 days from date of shipment
Capitalization of advance against equity under the extant FDI policy.	The capitalization should be completed within 180 days of receipt.	The applications be made within 180 days from the date of incorporation of company

Source: RBI/2011-12/295 A.P. (DIR Series) Circular No.55 dated December 09, 2011

5. Delegation of compounding powers under FEMA to Regional Offices

RBI has delegated the powers to compound the contraventions of FEMA involving (i) delay in reporting of inward remittance, (ii) delay in filing of form FC-GPR after allotment of shares and (iii) delay in issue of shares beyond 180 days, to the Regional Offices. The powers delegated are

S. No	Contraventions	Regional offices	Amount of Contravention
1	Delay in reporting of inward remittance and delay in filing of form FC-GPR after allotment of shares	Bhopal, Bhubaneswar, Chandigarh, Guwahati, Jaipur, Jammu, Kanpur, Kochi, Patna and Panaji	Upto One Crore Rupees
2	Delay in reporting of inward remittances, delay in filing of Form FC-GPR after allotment of shares and delay in issue of shares beyond 180 days	Ahmedabad, Bangalore, Chennai, Hyderabad, Kolkata, Mumbai and New Delhi	Without any limit

Source: RBI/2011-12/298 A.P. (DIR Series) Circular No.57 dated December 13, 2011

6. Introduction of New Category of NBFCs - 'Non Banking Financial Company-Micro Finance Institutions' (NBFC-MFIs)

RBI has decided to create a separate category of NBFCs viz; Non Banking Financial Company-Micro Finance Institution (NBFC-MFI). Consequently now there would be following categories of NBFCs:

- Asset Finance Company
- Investment Company
- Loan Company
- Infrastructure Finance Company

- e. Core Investment Company
- f. Infrastructure Debt Fund- Non- Banking Financial Company
- g. Non-Banking Financial Company - Micro Finance Institution

Source: RBI/2011-12/290 A.P. (DIR Series) Circular No.40 dated December 02, 2011

- 7. External Commercial Borrowings (ECB) for Micro Finance Institutions (MFIs) and Non-Government Organisations (NGOs) - engaged in micro finance activities under Automatic Route

RBI has decided to permit MFIs to raise ECB up to USD 10 million or equivalent during a financial year for permitted end-uses, under the Automatic Route.

Source: RBI/2011-12/298 A.P. (DIR Series) Circular No.59 dated December 19, 2011

CORPORATE & OTHER LAWS

- 1. Extension of timeline for PAN Based DIN

MCA has extended the date for applying of PAN Based DIN of Indian Directors till February 29, 2012.

Source: Circular 70/2011 dated: December 15, 2011

- 2. Company Law Settlement Scheme (CLSS, 2011) extended

Ministry of Corporate Affairs (MCA) has extended the date for filing under CLSS, 2011 till January 15, 2012 which was earlier effective up to December 15, 2011.

Source: Circular 71/2011 dated: December 15, 2011