

TECHNICAL UPDATE

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

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DIRECT TAX

1. Applicability of TDS provisions to the payments made abroad by a Foreign Company to employees rendering services in India

The Supreme Court of India has ruled that foreign companies operating in India must deduct TDS on salaries paid overseas to their expatriate employees, if the payment of salary abroad (in home country)

by the foreign company has any connection or nexus with their employment in India. The payment of salary in home country of the expatriates would constitute income which is deemed to accrue or arise to the recipient in India under section 9(1)(ii) of the Income Tax Act. Accordingly, TDS provisions would stand attracted.

Source: CIT Vs Eli Lilly & Company (I) Pvt. Ltd. – (2009) Supreme Court - [Civil Appeal No. 5114/2007 with CA Nos. 5152/2005, 1775/2006 & 1782/2006 etc]

2. Applicability of section 194C of Income Tax Act in case of contracts for sale of goods

The contracts for the sale of goods shall not attract the provisions of section 194C only because of the reason, that the assessee who is a trader of health products, monitors the manufacturing process of its vendors from time to time to ensure that the products manufactured by the vendors are as per its specifications. The tribunal held that such contracts are purely contracts of sale of goods wherein the seller incurs the cost of material and uses his own infrastructure and the property in goods is only transferred after they are delivered to the buyer and therefore are not within the purview of section 194C.

Source: Novartis HealthCare Pvt. Ltd. Vs ITO - (2009) ITAT Mumbai - [ITA Nos. 310 to 312/Mum/2006]

3. Amendment to TDS/TCS Mechanism

In an effort to bring greater transparency and accountability in income tax deduction/ collection mechanism, the Central Board of Direct Taxes ('CBDT') has notified new guidelines for system of payment, deposit, filing and issuing certificates for Tax Deducted/Collected at Source (TDS/TCS). After this amendment, TDS/TCS shall mandatorily require to be deposited through electronic means (i.e. Internet Banking/ Debit Card/ Credit Card). The CBDT has also replaced Form 16, Form 16A and introduced Form 17 and Form 24C will require to be electronically filed with the tax department. (w.e.f April 1, 2009)

Source: Direct Tax Notification No. 31 dated 25 March 2009

4. Credit of TDS deducted may be claimed by a person other than deductee

The CBDT has recently notified new income tax rules to allow the credit of Tax/deducted/at source (TDS) by persons other than the deductee. CBDT has also prescribes the situations and procedure

through which the tax credit will be made available for persons other than deductees. The credit for TDS will be allowed to persons other than the deductees only in cases where the relevant income is assessable to income tax in the hands of such other person.

Source: Direct Tax Notification No. 28 dated 16 March 2009

5. Furnishing of Information in respect of Payments made to Non-Residents

The CBDT has notified that w.e.f July 1, 2009, any person making payment to non-residents require to furnish certain specific information in form 15CA (Rule 37BB). The information is to be filed electronically and a copy of the same is to be submitted to the revenue authorities prior to remitting the payment along with a certificate from a Chartered Accountant in form 15CB (as done in the past).

Source: Direct Tax Notification No. 30 dated 25 March 2009

INDIRECT TAX

1. Exemption from Service Tax in respect of services received by a Developer or a Unit in a Special Economic Zone ('SEZ').

The Central Board of Excise & Customs ('CBEC') has issued a notification, whereby certain conditions have been imposed upon the developer of a Special Economic Zone ('SEZ') or a unit in a SEZ to claim exemption from service tax. The exemption is now available via a refund mechanism. Additionally, the developer or the unit needs to satisfy the following conditions in order to claim the exemption

- i) The list of services which are required in relation to authorized operation should be approved by the Approval Committee.
- ii) The services are actually used by the developer or unit in relation to the authorized operations in the SEZ.
- iii) The developer or unit actually pays the service tax.
- iv) The developer or unit does not claim CENVAT credit of such service tax.
- v) The claim for refund is to be filed within six months (may be extended by Assistant/Deputy Commissioner of Central Excise) of actual payment of service tax by developer or unit.
- vii) The exemption is available in respect of service tax paid on or after March 3, 2009.

Source: Notification No. 9/2009 – Service Tax dated March 3, 2009

2. Amendment to Form ST-3 (Form for filing the Service Tax Return)

The CBEC has modified the form prescribed for filing the Service Tax Return. Details of Service Tax Return Preparer ('STRP') (if so prepared) are also required to be submitted. The following details of the STRP needs to be given

- i) Identification No. of STRP
- ii) Name of the STRP

Source: Notification No. 10/2009 - Service Tax dated March 17, 2009

3. Custom Cargo Service Provider

The CBEC has issued Handling of Cargo in Customs Area Regulations, 2009 ('the Regulations'), whereby the concept of 'Custom Cargo Service Provider' ('Service Provider') has been introduced. The regulations defines a Service Provider to mean any person responsible for receipt, storage, delivery, dispatch or otherwise handling of imported or export goods. A person shall satisfy certain prescribed conditions to qualify as a Custom Cargo Service Provider. The regulation also defines the responsibilities of a Service Provider.

Source: Notification No. 26/2009 - Customs dated March 17, 2009

CORPORATE & OTHER LAWS

1. Issuance of ESOP/Sweat Equity to Chief Executive Officer (CEO), Managing Director (MD), Whole-Time Director (WTD), Principal Officer (PO)

It is now clarified that the issuance of ESOP/Sweat Equity to CEO/MD/WTD/PO would be governed by the following norms:

- In case, shares of a promoter/group/associate companies (whether listed or otherwise) is issued to CEO/MD/WTD/PO, the same will be governed by the provisions of the SEBI as may be applicable to that promoter/group company.
- In case shares of the Insurance company are issued as Sweat Equity, then the same will be governed by the provisions of the Sweat Equity Regulation issued by SEBI except for the guideline relating to pricing of shares.
- In case of shares of Insurance company are offered as ESOPs to CEO/MD/WTD/PO, then

- I. If the CEO/Managing Director/Whole-time Director/Principal Officer is one of the promoters or directly related to the promoters, then the same

will be governed by the provisions of SEBI (Issue of Sweat Equity) Regulations, 2002 except those relating to pricing of the shares.

- II. In other cases, the same will be governed by the SEBI's ESOS guidelines as amended by the SEBI from time to time, except the pricing of the shares.

Source: IRDA Circular No. 043-IRDA-CIR-COMPLIANCE-MAR-2009 dated 17 March 2009

2. Amendment in e-form 1AA, e-form 23C, e-form 1AD, e-form 24 under Companies Act, 1956

Ministry of Corporate Affairs vide notification no. G.S.R 183 (E) dated March 20, 2009, have amended the following e-forms:

- E-Form 1AA for particulars of Directors charged under section 5(g) of Companies Act, 1956
- E-Form 23C for application to Central Government for the appointment of Cost Auditor under section 233B(2) of Companies Act, 1956
- E-Form 1AD for application to Regional Director for confirmation of change of registered office within the state from the jurisdiction of one Registrar to the jurisdiction of other Registrar under section 17A.
- E-Form 24 for application to Central Government for increase in number of Directors under section 259 of Companies Act.

Revised e-forms will be effective from March 29, 2009.

Source: Company Affairs Notification No. G.S.R.183 (E) dated 20 March 2009

2. Amendment to Accounting Standard 11

The Central Government vide notification dated March 31, 2009 has amended AS-11 whereby the corporate bodies have been given an option to:

- i) Adjust gains or losses arising out of re-instatement of long term foreign currency liabilities incurred for acquiring capital assets against the cost of such capital assets.
- ii) In respect of other long term foreign currency monetary items, such exchange fluctuations may be carried in the balance sheet under the head "Foreign Currency Monetary Item Translation Difference Account" and the balance in this account should be amortised over the balance life of such liability /asset or March 31, 2011 whichever is earlier.

As per the notification, the above option is available only in respect of accounting periods commencing on or after December 7, 2006 and ending on or before March 31, 2011.

Source: G.S.R 225(E) dated March 31, 2009

3. Amendment to Schedule VI

The Central Government has issued notification dated March 31, 2009, whereby certain amendments have been made to Part I of Schedule VI (which relates to Form of Balance Sheet). As per the notification, the requirement of adjusting exchange fluctuations in respect of foreign currency borrowings incurred to acquire capital assets against the cost of such capital assets has been dispensed with. This requirement was in contradiction with the provisions of AS-11 which required the exchange fluctuation to be expensed by way of a charge to the Profit and Loss Account. However, as mentioned above, the option of capitalizing exchange fluctuations has been allowed to corporate bodies till March 31, 2011.

Source: G.S.R 226(E) dated March 31, 2009

FEMA

1. Standing Liquidity Facilities for Banks and Primary Dealers

Reserve Bank of India ('RBI') has reduced fixed Repo Rate under the Liquidity Adjustment Facility ('LAF') by 50 Basis Points with effect from March 4, 2009. Accordingly, the Standing Liquidity Facilities provided by RBI to banks (export credit refinance) and Primary Dealers (collateralized liquidity support) would be available at the revised repo rate, i.e., 5.0 per cent w.e.f. March 5, 2009.

Source: RBI/2008-09/400 REF. No. MPD.BC. 319 / 07.01.279/2008-09

2. Monitoring Framework for non-deposit taking NBFCs

RBI has notified that Non Banking Financial

Corporations ('NBFCs') (with assets size of Rs 500 million up to Rs 1 billion) should file a quarterly return within a period of one month from the close of the quarter, as hard as well as soft copy to the respective Regional Office of the Department of Non-Banking Supervision.

Source: RBI/2008-09/397 DNBS.PD/ CC. No. 137 / 03.05.002 /2008-09

3. Buyback or Prepayment of FCCBs

RBI has extended the date for completion of procedure for buyback of Foreign Currency Convertible Bonds (FCCB's) by Indian Companies from March 31, 2009 to December 31, 2009.

Source: RBI/2008-09/411 A. P. (DIR Series) Circular No. 58

4. Banking Companies (Nomination) Rules, 1985, amended

Banks have been directed to strictly comply with the system of acknowledging the receipt of the duly completed form of nomination, cancellation and or variation of the nomination, irrespective of the fact whether such acknowledgement is not demanded by the customers.

Source: RBI/2008-09/406 DBOD.No.Leg.BC.114/ 09.07.005/2008-09

5. Prudential Guidelines for Primary (Urban) Co-operative Banks

RBI has introduced revised guidelines on restructuring of advances and also to realign the extant instructions on the Debt Restructuring Mechanism for Small & Medium Enterprises.

Source: RBI/2008-09/403 UBD.PCB. BPD. No. 53/ 13.05.000/2008-09

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