

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. A golf course for which the right to use was obtained by a non-resident 'Golf Tournament Organiser' cannot be treated as a Permanent Establishment ('PE')

A golf course for which a non resident has obtained the right to use and on which a golf tournament was organised by the non resident, cannot be treated as a Permanent Establishment ('PE'). The Authority for Advance Ruling ('AAR') held that although such golf course can be treated as a place of business but since the tournament was organised as an isolated activity, the ingredient of regularity and continuity was missing and therefore such a place cannot be treated as a PE.

Source – Golf in Dubai L.L.C., In re (2008) AAR (AAR No. 770 of 2008)

2. **Provision made for bad and doubtful debts cannot be added back to net profit while computing book profits under Minimum Alternate Tax ('MAT')**

While computing book profit under Minimum Alternate Tax ('MAT'), provision for unascertained liabilities is required to be added back to net profit. The Supreme Court held that since provision made for bad and doubtful debts is made to account for the possible diminution in the value of assets (i.e. debtors) and not to provide for any possible liability, such a provision cannot be added back while computing book profits

Source –HCL Comnet Systems and Services Ltd. Vs Commissioner of Income-tax – (2008) SC (Civil appeal no. 5800 of 2008)

3. **The object for which subsidy is given determines the nature of incentive subsidy**

Where the subsidy was given and the receiver of such subsidy was required to use such subsidy only for the purpose of repayment of term loans taken by it for setting up new units/expansion of existing units, such a subsidy cannot be treated as of revenue nature and is a capital receipt and therefore not to be included in the taxable income of the assessee.

The court held that the character of the receipt (Subsidy) has to be determined on the basis of the purpose for which it is given and not on the basis of mode or mechanism of giving such subsidy.

Source –Ponni Sugars & Chemicals Ltd. Vs Commissioner of Income-tax – (2008) SC (Civil appeal no. 5694 to 5715 of 2008)

4. **Receipts on account of fractional entitlement to be taxed as capital gains**

When a company issues bonus shares to its shareholders, the entitlement of a shareholder may not be in round numbers, in such cases the shareholders are paid in cash in respect of such fractional entitlement. Tribunal held that since profit on sale of bonus shares is taxable as capital gains, the receipt on account of fractional entitlement shall also be taxes as capital gains.

Source –Kiran Nagji Nisar Vs Income Tax Officer – (2008) ITAT – Mumbai (IT appeal no. 3599/MUM/2003)

5. **A foreign entity not earning any income in India, but having employees based in India is liable to Fringe**

Benefit Tax ('FBT') if it pays fringe benefits to those employees

Authority for Advance Ruling ('AAR') held that Fringe Benefit Tax ('FBT') is apart from and in addition to income tax. Taxability to income is not a pre-requisite for liability in respect of FBT. Sub-section (2) of section 115WA clarifies that even where total income of an employer is not taxable, he will still be liable to pay FBT. Hence, if an employer pays fringe benefits to its employees based in India he is liable to pay FBT.

Source –Singapore Tourism Board, In re (2008) AAR (AAR No. 775 of 2008)

INDIRECT TAX

1. **Abolition of Customs duty on Aviation Turbine Fuel**

The Central Government has abolished customs duty on Aviation Turbine Fuel, making amendments in the notification earlier issued (21/2002, Customs).

Source –Customs Notification no.119 dated October 31, 2008

2. **Initiation of Anti-Dumping Investigation**

Automotive Tyre Manufacturer's Association has filed an application before the designated authority alleging dumping of new /unused pneumatic radial tyres with or without tubes and flaps of rubber used in buses and lorries from China and Thailand and requested for a anti dumping investigation for levy of anti dumping duties on these goods. The designated authority after finding that their was prima facie a case for the same has initiated an investigation.

Source: Anti-Dumping Investigation Notification No. 14-17-2008-DGAD dated October 21, 2008

3. **Clarification regarding levy of Additional Customs Duty (CVD) on import of readymade garments**

Industry had sought the clarification from Central Board of Excise and Customs (CBEC) as to whether imported readymade garments are being charged to import duty (CVD) based on Maximum Retail Price or Retail Sale Price of the garments. CBECE has clarified that at present CVD is chargeable on these goods on the basis of transaction value i.e. C.I.F Value plus landing charges only.

Source: Customs Circular No. 17, dated October 21, 2008

4. Clarification on refund of 4% Additional Customs Duty (CVD) in pursuance of Notification No. 102/2007-Unjust enrichment-Certification by Chartered Accountant (C.A.).

It was represented by industry that for the purpose of satisfying the condition that the burden of 4% CVD has not been passed on by the importer to any other person a certification from an independent C.A. may be accepted by Customs authorities. The Central Board of Excise and Customs (CBEC) has clarified that certificate from an independent C.A. will not be valid in this case. Only a certificate from the statutory /tax auditor of the company will be valid.

Source: Customs Circular No. 16, dated October 13, 2008

CORPORATE & OTHER LAWS

1. SEBI relaxes norms for promoters to up stake

Securities and Exchange Board of India (SEBI) relaxed the creeping acquisition norms. This is another step to improve investor sentiment. Promoters can increase their stake up to 75% through creeping acquisition, instead of 55% earlier. However, they will have to buy shares through normal market purchase and not through bulk, block or negotiated deals. Through a creeping acquisition, the promoters of a company can increase their stake in the company by buying up to 5 per cent of the company's equity annually.

(Source: Business Line, October 29, 2008)

2. SEZ developers, units eligible for concessional financing

Special Economic Zone (SEZ) developers and units would now be eligible for concessional financing that was available for infrastructure sector, with an Empowered Group of Ministers (EGoM) deciding that all activities other than purchase of land should be treated as infrastructure by banks for financing purposes. The EGoM decision would give a fillip to SEZ development as developers and units will be eligible for concessional financing from banks on the lines accorded infrastructure.

(Source: Business Line, October 29, 2008)

3. Airport Economic Regulatory Authority Bill cleared

The Airport Economic Regulatory Authority Bill, which seeks to create a level playing field and to foster healthy competition among major airports within

the country, was passed by Parliament. The Bill was cleared by the Lok Sabha, and got the Rajya Sabha approval thereby clearing the way for the establishment of the authority which will have a chairperson and two full-time members. The authority will be empowered to protect the reasonable interest of the users apart from regulating the tariff for aeronautical services at major airports. The Government considers an airport that handles at least 1.5 million passengers annually.

(Source: Business Line, October 29, 2008)

5. Rajya Sabha clears LLP Bill

The Rajya Sabha has cleared the Limited Liability Partnership (LLP) Bill, 2008. LLP, as proposed in the Bill, is a new corporate form that would give the benefits of limited liability but would allow its members the flexibility of organizing their internal structure as a partnership based on an agreement. A LLP will be a separate legal entity, liable to the full extent of its assets, and the liability of the partners would be limited to their agreed contribution in the firm. Further, no partner would be liable on account of the independent or unauthorised actions of other partners, thus, allowing individual partners to be shielded from joint liability created by another partner's wrongful business decisions or misconduct.

(Source: Business Line, October 29, 2008)

FEMA & OTHER LAW

1. External Commercial Borrowings Policy – Definition of Infrastructure sector expanded

RBI has expanded the definition of infrastructure sector so as to include mining, exploring and refinery sectors for the purpose of availing ECB.

Source: RBI/2008-09/210, A.P. (DIR Series) Circular No. 20 dated October 08, 2008

2. Interest Rates on Non-Resident (External) Rupee (NRE) Deposits

RBI has decided that the interest rates on fresh Non-Resident (External) Rupee (NRE) Term Deposits for one to three years maturity should not exceed the LIBOR / SWAP rates plus 100 basis points as on the last working day of the previous month for US dollar of corresponding maturities.

Source: RBI/2008-09/230, DBOD. No. Dir. BC. 64/13.03.00/2008-09 dated October 15, 2008

3. Interest Rates on FCNR (B) deposits

RBI has decided that on FCNR (B) deposits of all maturities, interest shall be paid within the ceiling rate of LIBOR / SWAP rates plus 25 basis points for the respective currency / corresponding maturities. On floating rate deposits, interest shall be paid within the ceiling of SWAP rates for the respective currency / maturity plus 25 basis points.

Source: RBI/2008-09/230, DBOD, No. Dir. BC. 64/13.03.00/2008-09 dated October 15, 2008

4. Overseas Foreign Currency Borrowings by Authorised Dealer Banks – Enhancement of limit

RBI has enhanced the limit up to which funds may be borrowed by AD Category-I banks and accordingly AD Category-I banks can now borrow from their Head Office, overseas branches and correspondents and overdrafts in nostro accounts up to a limit of 50 per cent of their unimpaired Tier I capital or USD 10 million (or its equivalent), whichever is higher.

Source: RBI/2008-09/227, A. P. (DIR Series) Circular No. 23 dated October 15, 2008

5. External Commercial Borrowings Policy: Liberalisation

RBI has now decided that payment made for obtaining license/permit for 3G Spectrum will be considered an eligible end - use for the purpose of ECB.

Further it has been decided that the borrowers will be extended the flexibility to either keep these funds off-shore or with the overseas branches / subsidiaries of Indian banks abroad or to remit these funds to India for credit to their Rupee accounts with AD Category I banks in India, pending utilisation for permissible end-uses.

Further the all-in-cost ceilings for average maturity period of three to five years has been revised and that for all in cost ceiling over 6 months LIBOR would be 300bps and for more than five years be 500bps.

Source: RBI/2008-09/245, A.P. (DIR Series) Circular No. 26 dated October 22, 2008

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