

RNM ALERT

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U.N. Marwah

Dear Readers,

The inflation outlook is improving as the tightening of monetary policy is starting to have the desired cooling effect on growth and inflation. Post the 50 bp hike in May 2011, experts now expect the Reserve Bank of India (RBI) to hike two more times in H2 2011 by 25 bp each time.

The RBI has taken out some relaxation for Overseas Direct Investments, considering the poor global business scenario, in which flexibility has been allowed for restructuring and write offs to be made in the overseas entities.

The Income Tax Department has made some changes in regard to the manner of issuance and authentication of the withholding tax Certificate in Form 16A applicable to all payments other than for salary. The new website based interface should resolve the current mismatch in credit being allowed under Form 16A.

Under the new green initiatives implemented by the Ministry of Corporate Affairs facility of participation in General Meetings, Board Meetings and Board Committee thru video conference has been permitted. Voting thru postal ballot has also been permitted thru electronic mode. These steps would greatly reduce the burden of holding physical meetings in a globalized digital environment, especially for non resident shareholders and directors who find it difficult to comply with such requirements.

Team RNM strongly believes that there is a need for further improvement in the level of transparency in the governance machinery in India. The recent events in New Delhi mark a beginning for the increased involvement of Civil Society to ensure better governance in India, which Team RNM whole heartedly supports.

Regards,

U.N. Marwah

For and behalf of the RNM Alert Editorial Board

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DIRECT TAX

➤ Case Laws

Deemed Dividend & International Taxation

Sec2(22)(e) “deemed dividend” not assessable if recipient not shareholder

Assessee, a company, received advances of Rs. 6.32 crores from Jacksons Generators Pvt. Ltd, a closely held company. Shareholders having substantial interest in the assessee company, also held 10% of the voting power in Jacksons Generators. AO & CIT(A) held that as the shareholders who held substantial interest in Jacksons Generators also had substantial interest in the assessee company, for purposes of s. 2(22)(e), the amount received by the assessee from Jacksons constituted “advances and loans” and was assessable as deemed dividend. Delhi HC approving [BhaumikColour](#) 313 ITR 146 (Mum) (SB), HELD that as the assessee was not a shareholder of the paying company, the

“dividend” was not assessable in its hands.

[Source: CIT vs. Ankitech Pvt Ltd (Delhi High Court) ITA No.462 of 2009 ITA No.2087 of 2010]

Sec5(2)(b): Income – Salary – Non Resident – On board of Ship – [Ss. 9(1)(ii), 15]

Salary earned by non-resident for services performed during his stay of 225 days outside India working on board a ship which was outside India, did not accrue or arise in India and as such the same was not taxable in India. (A. Y. 2005-06)

[Source: DIT (International – Taxation) & Anr. vs. Prahlad Vijendra Rao (2011) 51 DTR 95 / 239 CTR 107 (Karn.)(High Court)]

Sec9(1)(vi): Income deemed to accrue or arise in India - “Equipment-Use” Royalty If Payer has no control over equipment – DTAA - India-UK. [Art. 12(3)(b)]

The activity of transmitting raw data to user, processing of the data by such user by using software belonging to assessee and transmission of such data to assessee does not involve “use of any process” so as to constitute royalty under Article

12(3)(a). In order to constitute ‘use of equipment’, the customer should actually have domain or control over the equipment’s it should be at its disposal. (A. Y. 2004-05)

[Source: Standard Chartered Bank vs DDIT (Mum.)(Trib.) ; www.itatonline.org]

Disallowance of Interest u/s 14A

Sec14A: Business Expenditure - Exempted Income – Disallowance - Interest on borrowings on ground that assessee ought to have repaid borrowings instead of investing in tax-free investments invalid

Where borrowed funds were utilized for business purposes and investment in shares is made out of own funds, then disallowance under section 14A of interest on borrowed fund was not permissible. CIT vs. Hero Cycles Ltd. 323 ITR 518 (P&H) (A. Y. 2005-06)

[Source: Godrej Industries Ltd. vs. Dy. CIT (Mum.)(Trib.); www.itatonline.org]

Exempt Income- Mutuality

Sec2(24): Income – Non-occupancy Charges – Co-operative Housing Society – Mutuality

The receipts of non-occupancy charges, transfer fees and voluntary contribution from its members by the co-operative housing society is not taxable.

[Source: ITO vs. Grand Paradi CHS Ltd., ITA No. 521/Mum/2010, dt. 27-08-2010, ITAT 'G', Mumbai Bench, BCAJ pg. 20, Vol. 42-B, Part 4, January 2011 (Trib.)]

Sec4: Income - Mutuality - Income of Club from Surplus funds -Interest from Fixed deposits and Government Securities.

Assessee company is running a recreation club for its members the income earned from the members is exempt on the principle of mutuality. Income of the club from FDR's in banks and Government securities, dividend income and profit on sale of investment is also covered by the doctrine of mutuality and is not taxable. (A. Y. 2003-04)

[Source: CIT vs. Delhi Gymkhana Club Ltd. (2011) 53 DTR 330 (Delhi) (High Court)]

House Property

Sec22: Income from House Property – Ownership - Building constructed on land taken on lease and let out - Deemed Owner – [S. 23, 27(iii)]

Assessee having constructed the building on land taken on lease from NDMC, which is

the owner, further in view of the provisions of section 27(iii) it is the sub licensee who would be “deemed owner” of those premises which the sub licenses transferred to the occupiers and those occupiers are paying rent/ license fee to the sub-licensees and assessee only collected interest free security deposits from sub licensees and no rent, therefore, provisions of section 23 are not applicable. (A. Y. 1999-2000)

[Source: CIT vs. C. J. International Hotels Ltd. (2011) 53 DTR 92 (Delhi)(High Court)]

Sec 23(1)(a)

Income from House Property – Determination of ALV - Not bound by standard rent, ratable value & can adjust if interest-free deposit reason for low actual rent.

[Source: Tivoli Investment and Trading Co vs. ACIT (ITAT Mumbai)ITA No. 2808 and 2809/Mum/1996; www.itatonline.org]

Profit & Gain from Business & Professions

Sec28(i): Gains arising from PMS transactions are capital gains & not business profits

Transactions carried out via PMS are in nature of transactions meant for Wealth maximization & note cashing

profits on appreciation in value of shares. In case where assessee is engaged in systematic activity of holding of portfolio through PMS manager, it cannot be said that main object of holding the portfolio is to make profit by sale of shares. The high number of transactions are misleading as these are computer split transactions and not independent transactions. Hence, gains arising out of PMS transaction has to be assessed as Capital Gain and not business income. (A. Y. 2006-07)

[Source: ITO vs. RadhaBirju Patel (ITAT Mumbai)I.T.A No. 5382 Mum/2009; www.itatonline.org]

Sec36(1)(iii): Business Expenditure – Interest

Where the assessee was having sufficient non-interest bearing fund by way of share capital and reserves and there was no nexus between the borrowings of the assessee and advances made by it, no disallowance under section 36(1)(iii) of the Act was called for. (A. Y. 2001-02, 2003-04, 2004-05)

[Source: CIT vs. Bharti Televenture Ltd. (2011) 51 DTR 98 (Del.)(High Court)]

Sec37(1): Business Expenditure – Contingent Liability – Suit filed by Bank.

Interest payable to the bank on the loan with respect to which the bank had filed suit for recovery cannot be disallowed treating the same as contingent liability merely for the reason that the bank had not shown the accrued interest in its books. (A. Y. 1992-93)

[Source: Friends Clearing Agency P. Ltd. vs. CIT (2011) 49 DTR 297 / 237 CTR 464 (Del.)(High Court)]

Sec37(1): Business Expenditure – Convertible Debentures – Capital or Revenue Expenditure

Expenses incurred on the issue of convertible debentures has to be treated as Revenue expenditure. (A. Y.1993-94)

[Source: CIT vs. ITC Hotels Ltd. (2011) 238 CTR 447 / 32 DTR 215 / 190 Taxman 430 (Kar.)(High Court)]

Sec37(1): If “bad debt” not allowable u/s 36(1)(vii), claim for deduction u/s 37(1) can be raised for first time even before High Court

Assessee advanced sums to a supplier. Supplier failed to deliver the goods or to refund the advance. **If a loss of a debt does not come within s. 36(1)(vii), a claim can be made u/s 37(1).** There is a clear distinction between a

business expenditure and a business loss. Non-capital expenditure incurred for the purpose of business can be deducted u/s 37(1). Merely because the claim was made under one provision of the Act and not under another provision does not debar the assessee from claiming deduction u/s 37(1) even if it was not raised before the lower authorities.

[Source: Mohan Meakin Limited vs. CIT (Delhi High Court)ITA No.405/2007]

Sec40(a)(ia): Amounts not Deductible - Deduction of Tax at Source – Contractor – Sub-contractor - Labour Charges. (S. 194C)

It was noted from records that a small fraction of total expenditure was in form of labour charges, and as such, it was difficult to say that contract was for supply of labour or work and would rather be categorized as one for purchase of goods, though some labour work stood performed. As it was not a case of contract for service or labour, provision of section 194C cannot be applicable consequently disallowance was deleted. (A. Y. 2005-06)

[Source: S. T. Reddiar & Sons vs. Dy. CIT(2011) 129 ITD 475 / 135 TTJ 480 / 49 DTR 326 (Coch.)(Trib.)]

Sec40A(2): Expenses or Payments not deductible – Excessive or unreasonable – Same rate of tax – Disallowance not justified

Where assessee purchased from its subsidiary material at prices higher than the market rate for assured supply, there was no question of diversion of funds since both the assessee and the subsidiary were subjected to the same rate of tax, hence there was no warrant for addition by invoking section 40A(2). (A.Y. 1985-86)

[Source: CIT vs. V. S. Dempo & Co. P. Ltd. (2011) 196 Taxman 193 (Bom.)(High Court)]

Sec43B: Deductions - Actual Payment - Sales Tax – Extended filing of Return. (S. 139)

Where time for filing of return is extended in terms of proviso to section 139(1), it automatically means extension of due date for purpose of section 43B, thus, Sales Tax paid within extended time for filing return cannot be disallowed under section 43B. (A. Y. 1988-89)

[Source: CIT vs. Narendra Anand (2011) 198 Taxman 51 (Delhi)(High Court)]

Capital Gain

Sec45: Capital Gains Tax – India-Mauritius – DTAA [Article 13(4)]

Applicant is a company incorporated in Mauritius and was issued a Tax Residence Certificate by the Mauritius Tax Authorities. It realized capital gains from sale of shares in Indian company – AAR observed that in the case of Azadi Bachao Andolan 263 ITR 706, the Honorable Supreme Court has held that the certificate of residence issued by Mauritius Revenue Authority constitutes a valid and sufficient evidence of residential status under DTAA. Also, CBDT in Circular No. 682 dated 30.03.1994 has further clarified that under the DTAA, a resident of Mauritius having income from alienation of shares of Indian company shall be liable to tax only in Mauritius. In the case of E*Trade Mauritius, AAR No. 862 of 2009, and, the Delhi ITAT in the case of Saraswati Holding Corporation, 2009-TIOL-529-ITAT-DEL, held the view that the gains arising out of alienation of shares of an Indian Company to a company who is a resident of Mauritius is liable to tax only in Mauritius in terms of Article 13(4) of the DTAA. Hence ruled that on the facts presented

by the applicant and in the light of legal position discussed, the applicant is not liable to pay capital gains tax in India in respect of the transfer of shares.

[Source: D. B. Zwirn Mauritius Trading No. 3 Ltd., Mauritius - AAR No. 878/2010 dt. 28-3-2011 (AAR)]

Sec45: Capital Gains - As TDR has no cost of acquisition, amount received not taxable

Transferable Development Rights (TDR) granted by the Development Control Regulations for Greater Mumbai, 1991, qualifying for equivalent Floor Space Index (FSI) have **no cost of acquisition** and so sale thereof **does not give rise to taxable capital gains (Jethalal D. Mehta vs. DCIT 2 SOT 422 (Mum) followed).**

[Source: ITO vs. Hemandas J. Pariyani (ITAT Mumbai) ITA No. 2508/Mum/2010]

Sec50C does not apply to transfer of “leasehold rights” as it is not “land or building”

Section 50C is a deeming provision which extends only to a capital asset which is “land or building or both”. A deeming provision cannot be extended beyond the purpose

for which it is enacted. If a capital asset cannot be described as “land or building or both”, s. 50C cannot apply. **A lease right in a plot of land is neither “land or building or both”. The distinction between a capital asset being “land or building or both” and any “right in land or building or both” is well recognized. “Land or building” is distinct from “any right in land or building”. Consequently, s. 50C does not apply to leasehold rights.**

[Source: Atul G. Puranik vs. ITO (ITAT Mumbai) I.T.A.No.3051/Mum/2010]

Undisclosed Income

Sec68: Cash Credits- Gifts.

Assessee received gift of Rs. 1 lakh from ten individuals. It was noted from the records that donors had deposited monies in their bank account on same day or one day prior to making of gifts through account payee cheques. It was observed that, personal withdrawals of donors for their house hold expenses were petty and it did not support status of donors to gift of ` 1 lakh, besides none of donors was relative of assessee, in view of the facts gifts received by the assessee

confirmed as cash credits. (A. Y.2001-02)

[Source: Arvind Kumar Mohani vs. ITO (2011) 129 ITD 117 / 54 DTR 33 (JB)(TM)(Trib.)]

Sec69B: Investment not disclosed in books of account – Undisclosed Income

Addition under section 69B of the Act alleging undisclosed investment cannot be made merely on the basis of District Valuation Officer's (D.V.O.) report when the books of accounts of the assessee are not rejected nor any incriminating material was found during the search to suggest that assessee had made any payment over and above the consideration mentioned in the return.

[Source: CIT vs. Bajrang Lal Bansal (2011) 51 DTR 287 (Del.)(High Court)]

Transfer Pricing

Sec92C: Transfer Pricing

The fact that assessee has himself included in the list of comparables, initially cannot act of estoppel particularly in light of the fact that the AO had only chosen the companies which are showing profits and had rejected the other companies which showed loss (Quark System vs. DCIT 38 SOT 307 (SB) followed).

[Source: Sapient Corporation Pvt Ltd vs. DCIT (ITAT Delhi)L.T.A. No. 5263/Del/2010]

Assessment Procedure

Section 133A: Survey – Statement – Disclosure – Retraction – Addition

Addition cannot be made solely on the basis of statement recorded during survey in absence of any corroborative evidence and supporting material in case wherein it has been retracted.

[Source: ACIT vs. Prabhu Dayal Kanojia (2011) Tax World Vol. XLV Part-1 Page 23. (January, 11)(Trib.)]

Sec139(1): Return - Foreign Company – DTAA - India-Netherland

A foreign company, which is liable to be taxed in India by virtue of section 5(2) is required to file its return under section 139 notwithstanding that it is not liable to pay tax in India due to provisions of DTAA.

[Source: Vnu International B. V. In Re (2011) 240 CTR 12 (AAR)]

Sec143(3): Assessment – Notice by Affixture – Assessment held to be invalid.

Where notice for assessment had been given only a week prior to the expiry of the

limitation period by way of affixture and neither was any other mode of service adopted nor was it shown that the assessee had refused to accept service, it was held that the notice was invalid and consequently the assessment was struck down. (A. Y. 1969-70)

[Source: CIT vs. Kishan Chand (2011) 196 Taxman 88 (P&H)(Mag.)(High Court)]

Sec147: Reassessment – Change of Opinion – Investment – Business Income

Where assessment was completed holding that the income from conversion of equity share from stock-in-trade to investment was business income. Reassessment proceedings initiated merely by taking view that income should be taxed under the head short term capital gain amounted to a mere change of opinion as such liable to be quashed. (A. Y. 2005-06)

[Source: Ritu Investment P. Ltd. vs. CIT (2011) 51 DTR 162 (Del.)(High Court)]

Sec151: Reassessment – Sanction for issue of notice – Application of Mind. (S. 148)

Merely affixing a 'yes' stamp and signing underneath suggested that the decision was taken by the Board in a

mechanical manner as such, the same was not a sufficient compliance under section 151 of the Act. (A. Y. 1965-66)

[Source: **Central India Electric Supply Co. Ltd. vs. ITO (2011) 51 DTR 51 (Del.)(High Court)**]

Tax Deduction at Source

Sec194-I: Even fixed charges for hire of vehicles not “rent” for s. 194-I TDS

The contract was for “carriage of passengers” for which the assessee paid a fixed amount. Therefore, the payment of vehicle hire charges fell within the scope of s. 194C and was not “rent” for section 194-I.

[Source: **Ahmedabad Urban Development Authority vs. ACIT (ITAT Ahmedabad) ITA No.1637/Ahd/2010**]

Sec194I : Deduction of Tax at Source – Rent - Mobile Service Provider

Payment by assessee to other mobile telephone service providers for national roaming facility is not for use of equipment. The assessee was mere a facilitator between its subscriber and other service provider, facilitating a roaming call to be made by the subscriber. The payment of roaming charges by the assessee to other service providers could not be considered as rent within

the meaning of Explanation (i) below section 194-I, therefore there was no liability on the part of the assessee to deduct tax at source. (A. Y.2007-08, 2008-09, 2009-10)

[Source: **Vodafone Essar Ltd. vs. Dy. CIT (2011) 9 ITR 182 (Mum.)(Trib.)**]

Penalty

Sec271B: Penalty – Project Completion Method – Advance received cannot be treated as sale

When the assessee was following the project completion method of accounting, the advances received agent booking of flats could not be treated as sale proceeds/ turnover/ gross receipts. Thus penalty under section 271B is deleted.

[Source: **Siroya Developers vs. Dy. CIT, ITA No. 600/Mum/2010, dt.12-1-2011, ITAT Mumbai ‘T’ Bench, BC AJ p. 38, Vol. 42-B, Part 6, March 2011 (Trib.)**]

Sec271(1)(c): Penalty – Concealment – Where surrender of income is not voluntary – Levy of penalty justified

In the instant case the assessee has surrendered his income after the Assessing Officer had made substantial progress in the investigation and the

assessee had also not cooperated with the enquiry. The High Court held that such surrender cannot be held to be voluntary nor made bona fide, so as to avoid penalty. The High Court relied on the decision in the case of Bhairav Lal Verma vs. Union of India 230 ITR 855, where the meaning of word ‘voluntary’ in the context of waiver provisions under section 273A was discussed.(A. Y. 2004-05) [Source: **CIT vs. Rakesh Suri (2011) 331 ITR 458 (All)(High Court)**]

Sec271(1)(c): Penalty – Concealment - Book Profit - Despite Concealment, no section 271(1)(c) penalty if section 115JB book profits assessed. (S. 115JB)

Pursuant to a search under section 132 and the detection of incriminating documents, the assessee offered additional income. The Assessing Officer computed the income under the normal provisions and levied penalty under section 271(1)(c) for concealment of income. However, as the book profits computed under section 115JB was higher, the assessee was assessed under section 115JB. The assessee’s appeal against the levy of penalty under section 271(1)(c) was rejected

by the CIT(A). However, on appeal to the Tribunal, HELD: It was held by Hon'ble Mumbai Tribunal that, the concealment of income had its repercussions only when the assessment was done under the normal procedure. If the assessment as per the normal procedure was not acted upon and it was the deemed income assessed u/s 115JB which became the basis of assessment, the concealment had no role to play and was totally irrelevant. The concealment did not lead to tax evasion at all. (A. Y. 2005-06) [Source: Ruchi Strips & Alloys Ltd. vs. Dy. CIT (Mum.)(Trib.); www.itatonline.org]

Sec271(1)(c): Penalty – Concealment - Mere making of claim not sustainable in law not sufficient for levy of penalty

Mere making of a claim which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars. The assessee in the present case had made a bona fide claim and hence following the Apex Court's decision in the case of Reliance Petro Products Pvt. Ltd., it was held

that penalty under section 271(1)(c) of the Act was not leviable. (A. Y. 2006-07)

[Source: Walter Saldhana vs. Dy. CIT (2011) 44 SOT 26 (Mum.)(Trib.)]

➤ **Circular/Notifications**

New procedure to be followed for issuance and authentication of Form 16A

Form 16A is the TDS certificate for payments other than salary - **For TDS deducted on or after 1-4-2011**

I. Objective

1. To eliminate the difference between TDS amount reflected in Form No. 26AS (TDS credit granted by department) and Form No.16A (TDS certificate issued by deductor).
2. To ease out the process of authentication of TDS certificate in Form No.16A (TDS certificate for payments other than salary).

II. Steps taken in the circular

1. This circular has made it mandatory for a Company

(including a banking company or a cooperative society engaged in banking business) to issue Form 16A by downloading it from TIN website. Other assesseees have an option to issue Form 16A by downloading it from TIN website.

2. If Form 16A is issued by downloading it from TIN website then it can be authenticated manually or by using a digital signature.

III. Procedure to be followed to generate the TDS Certificates through TIN Website

1. The deductor has to register their TAN with NSDL website.
2. After completion of TAN registration, again visit the website www.tin-nsdl.com and Login to TAN Account by providing the User Name, Password and TAN Number.
3. Provide the details as asked for by the website for every quarter. You will receive by email a text file from NSDL. Convert it into a PDF file / TDS certificate (Form 16A) and check the same for 100% accuracy.

3. If found in order, affix seal and signature and issue the certificate to the deductees by either using digital signature or manual signature.

[Source: Circular No. 3/2011 Dated 13-5-2011]

Transparency in Survey operations

Before the commencement of survey proceedings u/s 133A, survey teams will have to provide to the taxpayer the names, designations & contact numbers of their Chief Commissioner, Commissioner & Additional/

Joint Commissioner of Income Tax in the following proforma and so that in case of any grievance or otherwise, he can contact them.

As a proof of implementation of above directions, signature of the taxpayer surveyed would be obtained.

SN	Design	Name	Contact No (Land line)	Cell No

[Source: CBDT- S.N. 49, dated 27-5-2011]



INDIRECT TAX

Central Excise & Custom

➤ Case Laws

Cross-examination of CA

The SCN was issued to the assessee on basis of Chartered Accountant's Certificate and the assessee's request for cross-examination of Chartered Accountant was rejected. The Appellant had sought cross-examination of the Chartered Accountant before the Commissioner considering the manner of quantification of demand adopted by Revenue. That was denied. In an appeal preferred, this question was raised but the learned Tribunal

did not deal with the same issue. The Hon'ble High Court considered that the facts on record the cross examination was vital, as it goes to the very root of the matter.

And setting aside the earlier orders by lower appellate authorities remanded the matter back to the Commissioner to give opportunity to the appellants herein to cross examine the Chartered Accountant who had issued the certificate and thereafter to proceed according to Law.

[Central Excise Appeal (L) No. 37 of 2008]

[Source: Excise Law Times A97, 16th May 2011]

Rebate

Raw material removed to job worker and processed fabrics therefrom removed for export-applicant working under Rule 12B of Central Excise Rules, 2002- Rebate denied for part of goods where fabrics received on or after 9-7-2004 and cleared for export on or after 9-7-2004 as Rule 12B ibid abolished on 8-7-2004 and that Cenvat Credit on goods received after 8-7-2004 not admissible –Applicant not deemed manufacturer after 8-7-2004- No proof submitted that goods in transit during period and received on 9-7-2004 – Cenvat Credit available only on goods physically received in premises when Rule ibid

prevailed- Documents based on which credit taken omitted from Rule 7 of Cenvat Credit Rules, 2002 w.e.f. 9-7-2004- Cenvat Credit not available, debit of such credit cannot be considered as payment of duty- Rebate not admissible- Rule 18 of Central Excise Rules, 2002.

[Source: IN RE: ACME CLOTHING PVT. LTD, 2011(267) ELT 407 (G.O.I)]

Drawback

Re-export- Matching of export goods with goods imported- Part of imported goods i.e. Erythromycin Base sought to be re-exported as not meeting required description being ammonium chloride- Department intimated discrepancy after five months- Examination report at time of import not suggesting anything- Supplier willing to take back said goods but letter not suggesting that goods imported were ammonium chloride and not Erythromycin Base- Mere tallying marks and nos. in export and import document does not mean that identity of actual contents of package established- Test report giving description as ammonium chloride- Goods exported not tally with goods imported- Drawback claim rightly rejected- Section 74 of Customs Act, 1962.

[Source: IN RE: JUBILANT ORGANOSYS LTD, 2011(267) ELT 411 (G.O.I)]

Rebate

Sealing and examination of exports, absence of- Non-submission of ARE-1- Lack of self/departmental sealing along with respective examination/certification thereof with required formality of filing of ARE-1 within stipulated time- ARE-1 basic and essential export document as is an application for removal of excisable goods for export- Statutory condition of compulsory requirement of submitting ARE-1 copies, a must- Not established that goods not proved- Lapse not procedural lapse of technical nature- Non-preparation of stipulated ARE-1 and not following basic procedure of export, not condonable- Order rejecting rebate, upheld- Rule 18 of Central Excise Rules, 2002.

[Source: IN RE: AGRAWAL MARBLES & INDUSTRIES PVT. LTD, 2011(267) ELT 414 (G.O.I)]

Confiscated goods

Refund of sale proceeds- Deductions- Re-export of goods allowed by Govt. in its earlier order but Department disposed of confiscated goods brought by passenger- Refund

of sale proceeds denied holding that proceeds not enough even to adjust quantum of redemption fine and duty while applicants further directed to pay penalty- Submission of passenger that since re-export allowed, deduction of duty element and redemption fine unjustified- HELD: Re-export option allowed at later stage whereas seized goods already sold, being perishable in nature- No actual re-export- Sale proceeds of goods, when sold in Indian market as good as sale for home consumption and involve duty portion- Re-export option further not exercised within time stipulated in earlier order, orders not applicable for clearance for home consumption- Impugned order adjusting duty, fine and penalty, upheld.

[Source: IN RE: AMENA MOHD., 2011(267) ELT 419 (G.O.I)]

➤ NOTIFICATIONS/ CIRCULARS

Project Import- Clarifications

The Board has issued a detailed circular to plug the loopholes in the Project Import Scheme, such as fixing of time frame for finalization of assessments, enforcement of

bond/undertaking and notice for duty demand, penalty for non-compliance in case of non-compliance of Regulation 7, completion of plant site verification within 15 days of submission of relevant documents and monitoring of pendency by Commissioners and Chief Commissioners.

[Source: M.F. (D.R.) Circular No. 22/2011-Cus, dated 4-5-2011]

Bill of Entry/ Shipping bill- Manual Filing be allowed only in genuine cases

Manual processing and clearance of import/export goods shall be allowed only in exceptional and genuine cases and as an exception to Rule of EDI processing. Board also directs that data for manual documents should be compulsorily entered and transmitted at all locations

within the stipulated time-period.

[Source: M.F. (D.R.) Instruction F. No. 401/81/2011-Cus. III, dated 4-5-2011]

➤ **Service Tax**

Delhi HC stays service tax on lawyers

The Delhi High Court on 29.04.2011, during the hearing on Delhi High Court Bar Association Anr. Vs UOI and Ors in W.P.(C) 2792/2011 granted stay to a central government notification levying service tax on practicing lawyers.

[Source: <http://articles.timesofindia.indiatimes.com>]

Stay on service tax on representation services by CA

The writ petition (C) 2869 of 2011 filed before Hon'ble

Delhi High Court on 30-04-2011 against Service Tax Notification No. 32 dated 25th April, 2011 operative from 01/05/2011, F. No. 334/3/2011-TRU, herein the notification no. 25/2006 has been withdrawn, where in exemption from service tax was granted in reference to representation services by practicing chartered accountants, practicing cost accountant and practicing company secretaries and thereby bringing all the services provided by them under service tax net.

The said matter came for hearing on 02-05-2011 before Hon'ble Delhi Court whereing the said notification has been stayed till next date of hearing i.e. 23-05-2011 with notice to UOI.

[Source: <http://www.caclubindia.com/forum/service-tax-on-representative-services-stayed-142346.asp>]



COMPANYLAWUPDATES

➤ Circulars/Notificati on

Director Identification Number (DIN) Forms to be certified now

The Ministry of Corporate Affairs has decided that with effect from 12th June, 2011, all DIN-1 and DIN-4 applications has to be digitally signed by the practicing Chartered Accountants, Company Secretaries or Cost Accountants who shall also

verify the particulars of the applicant given in the applications.

[Source: MCA General Circular no. 32/2011 dated 31.05.2011]

Payment of MCA Fees – Regarding Electronic Mode

The Ministry of Corporate Affairs has decided that Challan mode of payment is allowed for amount less than

Rs.50,000/- in the following cases with effect from 29th May, 2011:

- i. Payment to 'Investor Education and Protection Fund' through 'Pay Misc. Fee' functionality;
- ii. Any payment made by user having category as 'Official Liquidator office';

- iii. Any payment made by user having category as 'MCA employee'

[Source: MCA General Circular dated 27.05.2011]

Revision of Form 23D

The Ministry of Corporate Affairs has revised Form 23D in the Companies (Central Governments) General Rules and Forms, 1956. The revised Form is effective from 29th May, 2011. The said form deals with information by Cost Auditor to Central Government.

[Source: MCA Notification G.S.R (E) dated 26.05.2011]

Revision of Form 8 and 17

The Ministry of Corporate Affairs has revised Form 8 and 17 in the Companies (Central Government's) General Rules and Forms, 1956. These revised forms are effective from 29th May, 2011. Form 8 deals with particulars for registration or modification of Charge and Form 17 deals with particulars for satisfaction of charges.

[Source: MCA Notification G.S.R (E) dated 26.05.2011]

Appointment of LLP as Statutory Auditors now permissible - LLP will not be treated as Body Corporate for Limited Purpose

The Ministry of Corporate Affairs has paved the way for the appointment of LLP, as the Statutory Auditor of the Company.

MCA vide its notification, has notified that LLP, which is a Body Corporate as per the Limited Liability Partnership Act 2008, shall not be treated as Body Corporate, for the purpose of section 226(3)(a) of the Companies Act 1956, in exercise of its powers under 2(7)(c) of the Companies Act 1956.

As section 2(7)(c) of the Companies Act 1956, the Central Government may by notification, notify that a Body Corporate, will not be recognized as Body Corporate for the purpose of the Companies Act 1956.

Section 226 (3) of the Companies Act 1956 provides for the disqualification for appointment of auditor of a company and as per clause (a) of this sub section, a body corporate cannot be appointed as Auditor. **The MCA by its aforesaid notification has**

taken LLP out of the purview of the Body Corporate under this sub section and therefore, LLP can be appointed as the Auditor of the company.

[Source: MCA Notification S.O. 1152(E) Dated 23.05.2011]

Clarification regarding 'Body Corporate' for the purpose of sec 226(3)(a) of the Companies Act, 1956

In response to the representation received from the Institute of Chartered Accountants of India, the Ministry hereby clarifies that limited liability Partnership of chartered accountants will not be treated as body corporate for the limited purpose of Section 226(3)(a) of the Companies Act, 1956.

[Source: MCA General Circular 30A/ 2011 dated 26.05.2011]

Clarification regarding applicability of provisions of sec 108A to 108I of Companies Act, 1956

The Ministry of Corporate Affairs has clarified that after repeal of the MRTP Act, 1969, the provisions of section 108A to 108I of the Companies Act,

1956 have become redundant and will have no legal force.

[Source: MCA General Circular no. 30/2011 dated 23.05.2011]

Issue of certificate by Digital Signature

The Ministry of Corporate Affairs has decided that all certificates and standard letters issued by the Registrar of Companies will now be issued electronically under the Digital Signature of the Registrar of Companies.

[Source: MCA General Circular no. 29/2011 dated 20.05.2011]

Participation by directors in meetings of Board/Committee of directors through electronic mode

The Ministry of Corporate Affairs has clarified that directors of the company may participate in a meeting of Board/Committee of directors under the provisions of companies Act, 1956 through electronic mode.

[Source: MCA General Circular no. 28/2011 dated 20.05.2011]

New Companies (Passing of the resolution by Postal Ballot) Rules, 2011

The Ministry of Corporate Affairs has in supersession of Companies (passing of the resolution by postal ballot) Rules, 2001 made new rules i.e. Companies (passing of the resolution by postal ballot) Rules, 2011. The said Rule permits voting by electronic mode also.

[Source: MCA Notification G.S.R (E) dated 30.05.2011]

Participation by shareholders in general meetings through electronic mode

The Ministry of Corporate Affairs has clarified that a shareholder of the company may participate in a general meeting under the provisions of companies Act, 1956 through electronic mode.

For this purpose, the Company shall also comply with the specified requirements and procedures, in addition to the normal procedures of the Companies Act, 1956 through electronic mode.

[Source: MCA General Circular no. 27/2011 dated 20.05.2011]

Certification of E-forms under the Companies Act, 1956 by the practicing professionals

The Ministry of Corporate Affairs has rectified Circular No. 14/2011 dated 08.04.2011 in the line 4(four) of paragraph 2, by inserting the words “including filing of Financial Statements in the eXtensible Business Reporting Language (XBRL) mode from the year 2011-12 onwards” after the words “MCA in electronic mode.”

[Source: MCA General Circular no. 26/2011 dated 18.05.2011]

Filing of Balance Sheet and Profit & Loss Account in eXtensible Business Reporting Language (XBRL) Mode

The Ministry of Corporate Affairs has substituted on the Circular No. 9/2011 dated 31.03.2011 for clauses (i) and (ii) of paragraph 2 under the Heading Coverage in Phase I as follows:

- (i) All companies listed in India and their subsidiaries, having **paid up capital of Rs.5 Crore and above or a turnover of Rs.100 Crore or above,**

excluding banking companies, insurance companies, power companies, Non Banking Financial Companies(NBFCs) and overseas subsidiaries of these companies.

[Source: MCA General Circular no. 25/2011 dated 12.05.2011]

Clarification Regarding Loan to Public Limited Companies u/s 295

The Ministry of Corporate Affairs has clarified that when the beneficiary of the loan/guarantee/security is a Public Limited Company, approval of Central

Government should only be sought if the provisions of sub-section (d) or (e) of Section 295 of the Companies Act, 1956 are attracted.

[Source: MCA General Circular no. 24/2011 dated 12.05.2011]

Central Government delegates powers to ROC from RD

1. These regulations may be called the Companies (Amendments) Regulations, 2011.
2. They shall come into force on the date of their publication in the official Gazette.

3. In Companies Regulations, 1956 (hereinafter referred to as the said regulations), in Part B, in regulation 3,5,7,9 and 14, for the word “Regional Director”, the word “Registrar of Companies” shall be substituted.
4. In the said regulations, regulations 11, 12 & Annexure- II shall be omitted.

[Source: MCA Notification G.S.R. 368(E) 09th May, 2011]

SEBI & RBI UPDATES

➤ Circular

Option to hold units in Demat Form

In order to facilitate investors, Mutual Funds should provide an option to the investors to receive allotment of Mutual Fund units in their demat account while subscribing to any scheme (open ended/close ended/Interval).

Mutual Funds/AMCs shall ensure that above mentioned option is provided to the investors in all their schemes (existing and new) from October 01, 2011 onwards.

[Source: CIR/IMD/DF/9/2011 dated 19.05. 2011]

<i>Overseas Investment Liberalization Rationalization</i>	<i>Direct</i>
	–
	/

With a view to providing more operational flexibility to Indian corporates having investments abroad, it has been decided to further liberalize / rationalize the following regulations relating to overseas direct investment:

i) Performance Guarantees issued by the Indian Party

At present, 'financial commitment' of the Indian Party includes contribution to the capital of the overseas Joint Venture (JV) / Wholly Owned Subsidiary (WOS), loan granted to the JV / WOS and 100 per cent of guarantees issued to or on behalf of the JV/WOS. Keeping in mind the utility and usage of the instrument of performance guarantees in project executions abroad and also considering the risks associated with such guarantees vis-à-vis financial guarantees, it has been decided that only 50 per cent of the amount of the performance guarantees may be reckoned for the purpose of computing financial commitment to its JV/WOS overseas, within the 400 per cent of the net worth of the Indian Party as on the date of the last audited balance sheet.

ii) Restructuring of the balance sheet of the overseas entity involving write-off of capital and receivables

The extant FEMA Regulations do not provide for the

restructuring of the balance sheet of the overseas JV/WOS not involving winding up of the entity or divestment of the stake by the Indian Party. In order to provide more operational flexibility to the Indian corporates, it has been decided that Indian promoters who have set up WOS abroad or have at least 51 per cent stake in an overseas JV, may write off capital (equity / preference shares) or other receivables, such as, loans, royalty, technical knowhow fees and management fees in respect of the JV /WOS, even while such JV /WOS continue to function as under:

(i) Listed Indian companies are permitted to write off capital and other receivables up to 25 per cent of the equity investment in the JV /WOS under the Automatic Route; and

(ii) Unlisted companies are permitted to write off capital and other receivables up to 25 per cent of the equity investment in the JV /WOS under the Approval Route.

The write-off / restructuring have to be reported to the Reserve Bank through the designated AD bank within 30 days of write-off/restructuring.

iii) Disinvestment by the Indian Parties of their stake in an overseas JV/WOS involving write-off

(a) Currently, in terms of Regulation 16 of the Notification No. FEMA 120/RB-2004 dated July 7, 2004, as amended from time to time, all disinvestments involving 'write off', i.e., where the amount repatriated on disinvestment is less than the amount of original investment, need prior approval of the Reserve Bank. In terms of A.P. (DIR Series) Circular No. 29 dated March 27, 2006 it was decided to allow the undernoted categories of disinvestment under the Automatic Route without prior approval of the Reserve Bank, subject to the following conditions:

i) In cases where the JV/WOS is listed in the overseas stock exchange;

ii) In cases where the Indian promoter company is listed on

a stock exchange in India and has a net worth of not less than Rs.100 crore; and

iii) Where the Indian promoter company is an unlisted company and the investment in the overseas venture does not exceed USD 10 million.

In partial modification of the above, it has now been decided to include listed Indian promoter companies with net worth of less than Rs.100 crore and investment in an overseas JV/WOS not exceeding USD 10 million, for disinvestment under the Automatic Route with the requirement that the Indian Party shall report the disinvestment through its designated AD Category I bank within 30 days from the date of disinvestment.

(b) It is also clarified that disinvestment cases falling under the Automatic Route would also include cases where the amount repatriated after disinvestment is less than the original amount invested, provided the corporate falls under the above mentioned categories.

iv) Issue of guarantee by an Indian Party to step down

subsidiary of JV /WOS under general permission

(a) Currently Indian Parties are permitted to issue corporate guarantees on behalf of their first level step down operating JV /WOS set up by their JV /WOS operating as a Special Purpose Vehicle (SPV) under the Automatic Route, subject to the condition that the financial commitment of the Indian Party is within the extant limit for overseas direct investment. As a measure of further liberalization, it has been decided that irrespective of whether the direct subsidiary is an operating company or a SPV, the Indian promoter entity may extend corporate guarantee on behalf of the first generation step down operating company under the Automatic Route, within the prevailing limit for overseas direct investment. Such guarantees will have to be reported to the Reserve Bank in Form ODI, as hitherto, through the designated AD concerned.

(b) Further, it has also been decided that issue of corporate guarantee on behalf of second generation or subsequent level step down operating

subsidiaries will be considered under the Approval Route, provided the Indian Party directly or indirectly holds 51 per cent or more stake in the overseas subsidiary for which such guarantee is intended to be issued.

[Source:RBI/2010-11/548 A.P. (DIR Series) Circular No. 69 dated May 27, 2011]

Increase in Housing Loan Limit under Priority Sector

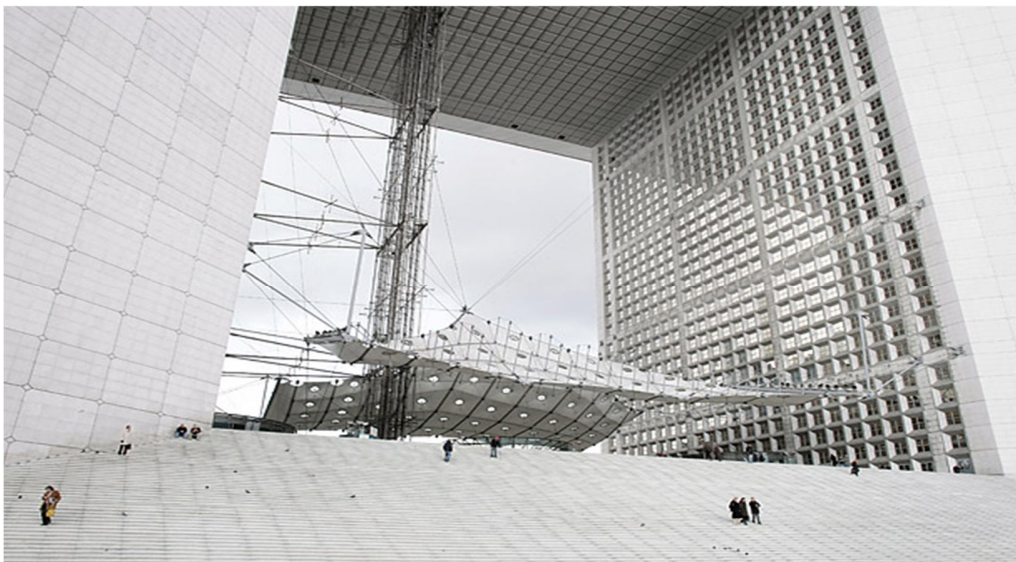
In supersession to the circular RPCD.No.RRB.BC.20/03.05.3 3/2007-08 dated August 22, 2007 on lending to Priority Sector, wherein loans up to Rs.20 lakh irrespective of location, to individuals for purchase / construction of dwelling unit per family, excluding loans granted by banks to their own employees are eligible for classification under priority sector.

Pursuant to the announcement made by Union Finance Minister in paragraph 44 of the

Budget for the year 2011-12, it has been decided to increase the above limit from Rs.20 lakh to Rs.25 lakh.

The above change will be applicable to housing loans sanctioned on or after April 1, 2011.

[Source: RBI/2010-11/533RPCD.CORRB.No.71 /03.05.33/2010-11 dated May 16, 2011]



CORPORATE FINANCE

➤ Latest News

INVESTMENT BANKING

Max New York Life Gets IRDA Approval To Raise Capital From Axis Bank

Private insurer Max New York Life will dilute four per cent stake by raising capital from its bancassurance partner Axis Bank, PTI reported quoting a top official. The Delhi-based life insurer has already got the regulatory approvals to dilute the stake.

[Source: The Hindu Business line, 11 May, 2011]

VENTURE CAPITAL

Fashion Retail Site 99labels.com Raises \$3.5M From Info Edge

Info Edge (India) Ltd, which runs the top recruitment site Naukri.com and other classifieds like matrimonial

site Jeevansathi and real estate portal 99acres.com, has announced an investment of \$3.5 million in online private sales portal 99labels.com. 99labels.com is a members-only, flash sale site offering luxury brands in fashion apparel, lifestyle products, accessories, footwear, watches, jewelry, fragrances and home décor. It offers up to 90 per cent discounts on branded merchandise.

[Source: NEWSPOLITAN, 11 May 2011]

Rajasthan Venture Capital Acquires 32% Stake In E-tendering Firm

Jaipur-based Rajasthan Ventures Capital Fund (RVCF) has acquired 32 per cent stake in its first round of funding in Mumbai-based NexTenders (India) Pvt Ltd for an undisclosed amount. RVCF has invested in this company through its Rs 150 crore SME Tech Fund. NexTenders is engaged in web-based procurement of goods and services and

mainly caters to various state governments, government agencies and public sector undertakings – both in India and abroad. For this purpose, the company utilizes e-procurement technologies, including e-tendering, e-auctions, e-catalogues, etc.

[Source: The Times of India, May 20, 2011]

CarZ Raises \$5M Series A Funding From IndoUS Venture Partners

CarZ, a Hyderabad-based auto repair services provider, has received \$5 million Series A funding from IndoUS Venture Partners (IUVP), a venture capital firm which provides early and mid-stage funding to new and growing businesses in India.

[Source: The Times of India, May 23, 2011]

Intel Capital Puts \$18M in New & Follow-On Investments

Intel Capital, the corporate venture capital arm of chipmaker Intel Corporation, has announced \$18 million in investments in four Indian

companies and in one Sri Lankan tech company. They include online travel company Yatra Online Pvt Ltd, mobile VAS company July Systems, online insurance retailer Policy Bazaar, healthcare tech company Sudhir Srivastava Robotics Surgery Center Pvt Ltd and a Colombo- and California-based open source software company WSO2. **The investments have been made from \$250 million Intel Capital India Technology Fund, established in December, 2005.**

[Source: The venture Bay, 13 May 2011]

Intellectap Launches Platform For Funding Social Enterprises

Intellectap, an Indian social sector advisory firm, has launched I-cube N (Intellectap, Impact Investor Network), a platform for HNWIs and corporate houses keen to invest in social enterprises. Intellectap will engage with these companies, not only till the time of transaction closure, but also post-investment and will work closely with these social enterprises to help them scale up and finally exit.

[Source : The venture Bay, May 6, 2011]

PRIVATE EQUITY

Warburg Pincus Invests \$150M In Diligent Power

After its foray into real estate space, leading private equity firm Warburg Pincus India Pvt Ltd is forging ahead in the power sector and has invested \$150 million in Bhopal-based Diligent Power Pvt Ltd for an undisclosed stake. Diligent Power, through its subsidiaries, is in the process of setting up power projects aggregating to 6,400 MW. These projects include a 1,200 MW coal-based thermal power plant in Chhattisgarh and a 1,320 MW super critical thermal power plant in Madhya Pradesh. With the funding, the company is planning to accelerate its growth plans.

[Source: Vccircle, May 12, 2011]

ICICI Venture Acquires 10% Stake In Fast Food Chain For \$55M

ICICI Venture Ltd, India's leading private equity fund,

has acquired 10 per cent stake in Gurgaon-based fast food & merchandise retail chain Devyani International Ltd, for a total consideration of \$55.70 million. Devyani International owns and operates fast food retail chains including Pizza Hut, KFC and UK-based coffee chain Costa Coffee, and also runs Disney Artist outlets in India. The company is a subsidiary of RJ Corporation which is engaged in diversified businesses such as beverages & breweries, fast food joints, dairy products, education, healthcare and hospitality

[Source: The Economic Times, May 13, 2011]

GMR Airports Gets \$200M From Stanchart, Jacob Ballas, Old Lane

The cabinet on Wednesday approved a foreign direct investment of \$200 million in GMR Infrastructure's airport holding company by a group of private-equity firms, according to a government notification. A unit of Standard Chartered PLC, Jacob Ballas and JM Financial Old Lane Capital will invest in GMR Airports Holding Ltd

[Source: Money control, May 12, 2011]

Mobile App Maker Sourcebits Raises \$10M from IDG, Sequoia Capital

Sequoia Capital and IDG Ventures India will make

investments of \$5 million each in Source bits, a Bangalore-based third-party developer of mobile applications. The company has already developed over 300 apps and caters to clients like Coca Cola, Procter & Gamble and GE.

[Source: Reuters, May 12, 2011]



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