

# RNM ALERT

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U.N. Marwah

Dear Readers,

The changes brought about in the Budget on the Service Tax front is giving many heartburn, with the already increasing costs for the average man on the street. The service tax on healthcare services has been fully exempted by the Department and now the Delhi Bar Association has filed a Writ Petition in the Delhi High Court to challenge the levy of service-tax on “Legal Consultancy Services”. The High Court had issued notice on the Writ Petition and stayed the application of the impugned provision till the next date of hearing being 23rd May 2011.

The complications arising from the Point of Tax Rules of service tax, will lead to many more litigations as well as the levy of service tax on restaurants. The service in restaurants was deemed to be a sale thru a Constitutional amendment brought about to enable the levy of Sales tax thereon. Upon such a deeming fiction having been created this subsequent levy of service tax, is in our opinion bad in law.

The Cabinet Committee on Economic Affairs has approved the norms for FDI into LLP’s. However, formal notification/ circular thereon is awaited either from the RBI or the DIPP. The said norms, permit 100% FDI thru the government approval route, with safeguards on funding, ownership and management.

A recent judgement of the full bench of the Delhi High Court in regard to house property income is significant in so far as it clears the position on the Annual Letting Value for properties rented with a high interest free security deposit.

Another judgement of the Delhi High Court has held that stamp duty is not payable on an increase in Authorised Capital of a Company.

Various green initiatives have been taken by the Ministry of Corporate Affairs, to enable use of emails and electronic voting for various corporate compliance requirements of companies. This would go a long way in not only reducing costs but also increasing efficiencies.

Regards,

**U.N. Marwah**

For and behalf of the RNM Alert Editorial Board

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## DIRECT TAX

### ➤ Case Laws

#### *Deemed Dividend*

##### **S.2(22)(e): Deemed Dividend - Advances given to Business Purposes**

Managing Director, received advances from the Company, pursuant to resolutions passed by it to enable the MD to purchase land which was to be developed by the Company in order to bifurcate the ownership of land from the development or construction of flats thereon so as to reduce the incidence of stamp duty on the ultimate customers, the transaction was motivated by business considerations and commercial expediency and therefore, the advances cannot be treated as deemed dividend under section 2(22)(e).

[Source: ACIT vs. Harshad V. Doshi (2011) 136 TTJ 351 (Chennai)(Trib)]

#### *International Taxation*

##### **S.9(1): Income deemed to accrue or arise in India - Fees for Technical Services – DTAA - India- Canada – [S. 115A, 234B, Art. 12(4)]**

Assessee, a non resident Company engaged in the business of providing

consultancy for infrastructure projects. It had entered into an agreement with the National Highway Authority of India(NHAI) to provide technical drawings and reports to NHAI to enable it to use the technology for its infrastructure projects which was founded by the World Bank. The contention of the assessee was that the fee received from NHAI was to be treated as “fees for included services” as prescribed in article 12(4) of the DTAA between India and Canada. In terms of this article, the tax chargeable is at 15%. However, the Assessing Officer was of the opinion that fee charged for the aforesaid project did not include “fee for included services”. He charged tax @ 20% as fee for technical services was chargeable to tax under the provisions of section 9(1)(viii) read with section 115A of the Act. High Court affirmed the view of the Tribunal in favor of Assessee.

[Source: DIT vs. SNC Lalvalin International, Inc. (2011) 332 ITR 314 (Delhi High Court)]

#### *Expenditure Incurred in relation to Income not*

#### *includible in Total Income*

##### **S.14A r.w.s. 36(1)(iii), section 10(2A) and section 28(v)**

Since there was direct/one-to one nexus between the funds borrowed on which interest was paid and the funds invested in the firm on which interest was received, such interest had to be deducted u/s 36(1)(iii) against the interest income assessable as business income u/s 28(v) and no disallowance of interest expenditure is called for u/s 14A.

[Source: ACIT v. Delite Enterprises Pvt. Ltd. (2011) 135 TTJ 663 (Mumbai)]

##### **S.14A: Business Expenditure - Exempted Income – Apportionment of Expenditure.**

Assessee made investment for earning tax free income from mixed funds and not possible to ascertain as to whether the investment in tax free instruments was out of assessee’s own funds and the AO having not established the nexus between the borrowed funds and investment in tax free funds disallowance on pro-rata basis was not proper.

[Source: Dy. CIT vs. Maharashtra Seamless Ltd. (2011) 52 DTR 5 (Delhi)(Trib.)]

**S.14A: Business Expenditure - Exempted Income - Disallowance cannot be made for “depreciation”**

It was held that section 14A permits a disallowance of “expenditure incurred by the assessee” and not of “allowance admissible” to him. There is a distinction between “expenditure” and “allowance”. The expression “expenditure” does not include allowances such as depreciation allowance. Accordingly, depreciation cannot be the subject matter of disallowance under section 14A (ratio of Nectar Beverages 314 ITR 314 (SC) followed); Similarly, it was further held that the deduction under section 80D is not expenditure for earning tax-free income but is a permissible deduction from gross total income under Chapter VIA.

[Source: Hoshang D. Nanavati vs. ACIT (ITAT Mumbai)(Trib)  
Source: www.itatonline.org]

**House Property**

**S. 23(1)(a)**

S. 23(1)(a) requires determination of the “fair rent” being “the sum for which the property might reasonably be expected to let from year to year”. If Assessing Officer

finds that the actual rent received is less than the “fair/market rent” because the assessee has received abnormally high interest free security deposit, he can undertake necessary exercise in that behalf. However, the notional interest on the interest free security cannot be taken as determinative factor to arrive at the “fair rent”. The ALV fixed by the Municipal Authorities can be the basis of adopting the ALV for purposes of section 23.

[Source: CIT vs. Moni Kumar Subba (Delhi High Court - Full Bench) ITA No.499 of 2008]

**S.23 and S.24**

Maintenance Charges recovered from the tenant and paid to a separate agency on account of charges for generator, lift, lighting, common area sweeping are allowed to be deducted from the rental income and not to be included as part of deduction under section 24 @ 30%. Interest paid on subsequent loan taken for repayment of original loan taken for purchasing the house property is deductible under section 24.

[Source: ACIT v Sunil Kumar Agarwal[2011] 8 ITR (Trib) 304 (Lucknow)]

**Profit & Gain from Business & Profession**

**S.28(i): Professional Income - AIR Information.**

In the absence of contrary material brought by the Revenue authorities, that the assessee had received professional fees more than what has been declared by him, no addition should be made by the Assessing Officer on account of non furnishing of partywise details of professional fees received during the year and non-reconciliation of professional fees received with AIR information.

[Source: S. Ganesh vs. ACIT (2011) TIOL 87 ITAT-Mum. 701 / (2011) 42-B. BCAJ (March P. 33)(Trib)]

**S. 32(1)(ii): Depreciation - Block of Assets – Ownership - Purchase of shares with right to occupy premises.**

The assessee made total payment of Rs.4.44 crores to WRPL which has been divided into two parts viz. consideration for shares at Rs. 2.76 crores and non-refundable construction of Rs. 1.67 crores. Both these payments are aimed at acquiring, using and occupying the property. But for the purchase of shares it is not permissible to become member. The assessee is entitled to

depreciation on the entire consideration.

[Source: SRI Adhikari Brothers Television Networks Ltd. vs. ACIT (2011) 52 DTR 295 (Mum.)(Trib.)]

**S.40(b)(v): Amounts not deductible – Partnership - Remuneration to Partners - CBDT Circular, which specifies that for section 40(b)(v), the partnership deed should specify the remuneration, is invalid.**

Section 40(b)(v) allows a deduction of payment of remuneration to a working partner if it is authorized by the partnership deed and not in excess of the limits. Section 40(b)(v) does not lay-down any condition that the partnership deed should fix the remuneration or the method of quantifying remuneration. Accordingly, CBDT Circular No. 739 dated 25.3.1996 which requires that either the amount of remuneration payable to each individual should be fixed in the agreement or the partnership agreement deed should lay down the manner of quantifying such remuneration goes beyond section 40(b)(v). The CBDT cannot issue a circular which goes against the provisions of the Act. The CBDT can only clarify issues but cannot insert terms and

conditions which are not part of the main statute. A partnership deed which provides that **the remuneration would be as per the provisions of the Act meaning thereby that the remuneration would not exceed the maximum remuneration provided in the Act** is valid and deduction is admissible.

[Source: DurgaDassDevkiNandan vs. ITO (HP High Court) ITA No. 4 of 2005]

### **Capital Gain**

#### **S.10(38)**

Assessee company holds 98.73% shares in BFSL a listed company. BFSL purchases a land costing Rs. 3.75 crores in the relevant Assessment Year. Assessee company transfers the shares held in BFSL to D and paid security transaction tax and claimed that the resultant long term capital gain falls under section 10(38) and therefore exempt from tax. Held that in the facts and circumstances of the case the transaction of sale of shares is only a colourable device to sell the land to D, which is a short term capital asset. Thus, the surplus arising on sale of shares will be taxed as short term capital gain.

[Source: Bhoruka Engineering Industries Ltd. v. DCIT [2011] 9 ITR (Trib) 75 (Bangalore)]

#### **S.45: Capital Gains - Conversion of units of UTI in to tax free bonds - Transfer – [S. 2(47)]**

Assessee claimed capital loss on account of conversion of units of UTI into tax free bonds. The Tribunal held that in the instant case was a simple case of conversion of one asset into another and there was no transfer of asset within the meaning of section 2(47) hence the Assessing officer rightly rejected the claim.

[Source: ACIT vs. ABC Bearings Ltd. (2011) 44 SOT 338 (Mumbai)(Trib)]

#### **S.48: Capital Gains - Cost of Acquisition - Indexed Cost - Date of Allotment Letter - Stamp Duty –Interest - Processing Charges - (S. 45).**

Stamp duty, interest, processing fee, development charges, fire fighting charges, generator charges, etc. paid to the builder form part of cost of acquisition incurred by the assessee for acquiring the ownership of the flat and therefore, assessee is entitled to deduction of all aforesaid payments under section 48(ii) on computation of capital gain on the sale of flat. Assessee is also entitled to indexation from 1995, when he started making the payment to builder and

received the allotment letter and not from the date of conveyance deed in 2001.

[Source: Praveen Gupta vs. ACIT (2011) 52 DTR 334 (Delhi)(Trib.)]

#### **S.50: Capital Gains - Depreciable Assets - Indexation**

Assessee claimed depreciation on capital asset (flat) for two years as it was used as office premises which was allowed. Flat was the only asset in the block of assets. No depreciation was claimed for latter years as the flat was not used for the purposes of business but leased on rent. Assessing Officer and CIT(A) held that the as the flat being only asset in the block of assets the capital gains is assessable as short term capital gains. On appeal the Tribunal held that the moment the assessee stopped claiming depreciation in respect of the flat and even let out the same for rent, it ceased to be a business asset. The Tribunal directed the Assessing Officer to allow benefit of indexation as claimed by the assessee treating the sale as long term capital asset.

[Source: Prabodh Investment & Trading Company Pvt. Ltd. vs. ITO, ITA No. 6557/Mum/2008 Bench 'C' dated 28-2-2011 (2011) 43-A BCAJ - April P. 34(Trib)]

#### **S.54: Capital Gains - Profit on sale of property used for residence - Exemption is available to multiple sales & purchases of residential houses - (S. 45)**

Though section 54 refers to capital gains arising from "transfer of a residential house", it does not provide that the exemption is available only in relation to one house. If an assessee has sold multiple houses, then the exemption under section 54 is available in respect of all houses if the other conditions are fulfilled. If more than one house is sold and more than one house is bought, a corresponding exemption under section 54 is available. However, the exemption is not available on an aggregate basis but has to be computed considering each sale and the corresponding purchase adopting a combination beneficial to the assessee. The decision of the Special Bench in **ITO vs. Sushila Jhaveri** (2007) 292 ITR (AT) 1 is distinguishable.

[Source: Rajesh Keshav Pillai vs. ITO (ITAT - Mumbai) Source: [www.itatonline.org](http://www.itatonline.org)(Trib)]

#### **Carry Forward & Set-off of Losses**

##### **S.70**

Carry forward and set off-- Provision providing for lower

rate of tax on short-term capital gains arising on transactions suffering securities transaction tax--Computation--Choice of setting off of short-term capital loss suffered after cut-off date against short-term capital gain earned prior to cut-off date-- Computation of capital gain prescribed under section 48 cannot be confused with rate of tax under sections 111A and 115D--Income-tax Act 1961,

[Source: First State Investments (Hongkong) Ltd. v. Asst. Director of Income-tax (International Taxation)(Mumbai) [2011] 8 ITR (Trib) 315 (Mumbai ITAT)]

##### **S.72**

Income earned by the assessee in the relevant year on sale of factory building, plant and machinery, although not taxable as profits and gains of business or profession, is an income in the nature of income of business though assessed as capital gains u/s 50 and, therefore, assessee is entitled to set off of brought forward business losses against the said capital gains.

[Source: Digital Electronics Ltd. V. Addl. CIT (2011) 135 TTJ 419 (Mumbai)]

### **Assessment Procedure**

#### **S.147: Reassessment - Beyond four years - No failure on the part of assessee - Bad Debts.**

Allowance of bad debt was specifically raised in the original assessment proceedings and on receiving explanation from assessee the claim of assessee was allowed, reassessment held to be invalid. [Source: Yash Raj Films P. Ltd. vs. ACIT (2011) 332 ITR 428 (Bom.)(High Court)]

#### **S.147: Grant of certificate u/s. 197 cannot debar an Assessing Officer from initiating a proceeding u/s. 147**

If any opinion is expressed at the time of grant of certificate u/s. 197, it is tentative or provisional or interim in nature and the same would not debar the Assessing Officer from initiating a proceeding u/s. 147 on the ground that there has been a change of opinion.

[Source: Areva T&D vs. ADIT (Delhi High Court) [2011] 10 taxmann.com 319 (Delhi)]

### **Tax Deduction at Source**

#### **S.194C: Deduction of Tax at Source - Contractor and Sub-contractor – [S. 40(a)(ia)]**

Where the transporters are hired by the vendors of the

goods, who directly made supplies to the factory of the assessee and charged the amount of transportation separately in their bill to the assessee, provisions of section 194C are not applicable, hence, amount paid cannot be disallowed by applying the provisions of section 40(a)(ia). [Source: Chang Hing Tannery vs. Dy. CIT / (2011) 42-B-BCAJ March P. 32(Kol)(Trib)]

#### **S.194H: Deduction of Tax at Source - Commission or Brokerage - Booking of Domestic and International Airline Tickets – [S. 40(a)(ia)]**

The transaction in question were not transactions between principal and agent but those transactions were between principal and principal. In order to bring services or transactions within expression “Commission” and “Brokerage” under section 194H, element of agency must be present. When the discount allowed / given by the assessee to the intermediaries was also allowed to passenger directly who booked the tickets with the assessee and the assessee was recording the transaction in its books of account net amount of the invoice, then it was not a case of commission or brokerage paid or payable by

the assessee to the intermediaries, hence, the provisions of section 194H were not applicable therefore no disallowance can be made under section 40(a)(ia).

[Source: ITL Tours and Travels (P) Ltd. vs. ITO (2011) 44 SOT 277 (Mum.) (Trib)& CIT vs. Qatar Airways (2011) 332 ITR 253 (Bom.)(High Court)]

### **Tax Administration**

#### **S.254(2)**

Appellate Tribunal – Power – Stay - Despite Third Proviso to section 254(2A), Tribunal has power to extend stay beyond 365 days if delay not attributable to assessee.

[Source: Tata Communication Ltd. vs. ACIT (ITAT Mumbai - Special Bench) I.T.A.Nos. 1106 to 1108/Mum/2008]

### **Penalty**

#### **S.271C: Penalty for failure to deduct tax at source - Mala fide intention - Deliberate defiance of law - No penalty for tax deduction at source breach if no “mala fide intention” or “deliberate defiance” of law - (S. 194C, 194I, 194J, 201).**

It was held that the fact that the assessee has not disputed the quantum is not a good ground for imposition of penalty unless and until material is brought on record to the effect that

assessee deliberately defied the provisions (Anwar Ali 76 ITR 696 (SC) referred). Further, it was also observed that levy of penalty under section 271C is not automatic. (Woodward Governor India 253 ITR 745 (Del.) followed). If no malafide intentions of any kind are attributed to the assessee for deducting tax under one provision of law than other, thus no penalty could be levied. [Source: CIT vs. Cadbury India Ltd. (Delhi High Court) [www.itatonline.org](http://www.itatonline.org)]

**S.271(1)(c):Penalty  
Concealment - Admission by  
High Court - Mere admission  
of Appeal by High Court**

**sufficient to disbar section  
271(1)(c) penalty.**

In quantum proceedings, the Tribunal upheld the addition of three items of income. The assessee filed an appeal to the High Court which was admitted. The Assessing Officer levied penalty under section 271(1)(c) in respect of the said three items. The penalty was upheld by the CIT(A). On appeal to the Tribunal, HELD allowing the appeal:

When the High Court admits substantial question of law on an addition, it becomes apparent that the addition is certainly debatable. In such circumstances penalty cannot

be levied under section 271(1)(c). The admission of substantial question of law by the High Court lends credence to the bona fides of the assessee in claiming deduction. Once it turns out that the claim of the assessee could have been considered for deduction as per a person properly instructed in law and is not completely debarred at all, the mere fact of confirmation of disallowance would not per se lead to the imposition of penalty.

[Source: Nayan Builders & Developers Pvt. Ltd. vs. ITO (Trib.) Source: [www.itatonline.org](http://www.itatonline.org)]



## INDIRECT TAX

### Service Tax

#### ➤ Case Laws

#### *Outdoor Catering Service is Input Service For Cenvat Credit*

The appellants are engaged in the manufacture of PVC pipes and fitting under Chapter No. 39 of the CETA, 1985. They availed Cenvat Credit on outdoor catering services. The Lower adjudication authority denied them. The contention of the appellant is that outdoor catering service is (1) a mandatory service provided in terms of the Section 46 of the Factory Act, 1948, (2) expenses are incurred in their factory are included in the cost of production of their final products, in support produced a certificate issued by the Cost Accountants.

Similar matter was decided by the Hon'ble Bombay High Court in CCE, Nagpur v Ultratech Cement Ltd. 2010-TIOL-745-HC-MUM-ST=2010 (260) ELT 369(Bom.) in favour of the Assessee. The Hon'ble Court it's decision upheld the decision of Tribunal's Larger Bench in Commissioner v GTC

Industries Ltd.- 2008(12) STR 468(Tribunal-LB)

[Source: **Finolex Industries Ltd. V Commissioner Of C. Ex., Pune, 2011 (22) STR 168 (Tri-Mumbai)**]

#### *Servicetax liability of Sub-Contractor*

In this matter the appellant was proved not to be an employee as she was working on a retainership basis and she was getting a fixed remuneration per month and, therefore, the appellant was not an employee of Ambience. The appellant was demanded service tax as sub-Contractor. Though vide master Circular dated 23-8-2007 sub-contractor made liable to pay service tax, the Tribunal relied on the decision in *Urvi Construction v. Commissioner of Service Tax, Ahmedabad-2010(17) STR 302*, in which tribunal held that, in case the appellant is required to pay service tax it would amount to taxing the same service twice. The above case law supports that the liability to pay service tax on the prime or principle service provider. The appellant submitted that they produced a certificate before the Commissioner (Appeals) to the effect that Ambience (Principle

Service Provider) has paid the service tax. However, the learned Commissioner (Appeals) has not taken the certificate on record nor gave any finding on this aspect. I find that this certificate was not even before the lower authority. Therefore, this requires reconsideration. The matter remanded back.

[Source: **RubitaGidwani V Commissioner Of Service Tax, Mumbai, 2011 (22) STR 159 (Tri-Mumbai)**]

#### *Sub-Contractor not liable for service tax before 23-8-2007*

In this matter, the appellant was providing 'Repair and Maintenance Service' on behalf of M/s Xerox Modicorp Limited. The department demanded service tax from the appellant in capacity of sub-contractor for the period July, 2003 to June, 2004. The appellant contended that service tax on sub-contractor was applicable w.e.f. 23-8-2007. They contended that since principle had already paid service tax, thus, sub-contractor is not liable to pay service tax. Since this fact was not raised before the lower adjudicating authority, the matter was

remanded to the lower adjudicating authority.

[Source: Neil Enterprises V Commissioner Of Service Tax, Mumbai, 2011 (22) STR 161 (Tri-Mumbai)]

### *Wrong Form for refund is rectifiable error*

The appellant filed rebate claim in wrong form, thus claim was rejected by the lower authority. In appeal the appellant relied upon the decision of the Tribunal in case of CCE v. Nisha Chemicals as reported in 1986 (26) ELT 809(Tri) to submit that the forms are meant to facilitate and not to act as hindrance. The Tribunal agreed with the submissions that substantive right cannot be denied on the ground that covering letter of the refund claim is wrong. This is rectifiable error.

[Source: Amity Thermostats Pvt. Ltd. V Commissioner Of C. EX. Vapi, 2011 (22) STR 157 (Tri-Ahmd.)]

## ➤ Notifications/Circulars

### *New Services notified*

Provision of the Finance Act, 2011 came into force w.e.f. 1<sup>st</sup> May, 2011. Two new services namely 1) Restaurant and Bar Service, 2) Short term

accommodation provided by Hotel Service came under service tax act w.e.f. 1<sup>st</sup> May, 2011.

[Source: Notification No. 29/2011 – Service Tax dated 25<sup>th</sup> April, 2011]

### *Health Services exempted*

W.e.f. 1<sup>st</sup> May, 2011 Health Service provided by Hospital or Medical Establishments (Section 65 (105) (zzzz)) has been fully exempted.

[Source: Notification No. 30/2011 – Service Tax dated 25<sup>th</sup> April, 2011]

### *Low cost hotel Services exempted*

Short term Accommodation Services provided by Hotels have been exempted when the declared tariff for providing such accommodation is less than Rupees 1000/- per day from whole of service tax.

[Source: Notification No. 31/2011 – Service Tax dated 25<sup>th</sup> April, 2011]

### *CA/ CS Representation Services taxable*

The Govt. of India has rescinded the notification no. 25/2006 – Service Tax dated 13<sup>th</sup> July, 2006 vide which taxable service, provided or to be provided by a practicing Chartered Accountant, a practicing Cost Accountant and a practicing Company Secretary, in this professional capacity, to a client relating to

representing the client before any statutory authority was exempt.

[Source: Notification No. 32/2011 – Service Tax dated 25<sup>th</sup> April, 2011]

### *Certain Coaching Services exempted*

The Central Government exempts: (i) any preschool coaching and training (ii) any coaching or training leading to grant of a certificate or diploma or degree or any educational qualification which is recognised by any law. For the time being in force; when provided by any commercial coaching or training centre from the whole of the service tax leviable.

[Source: Notification No. 33/2011 – Service Tax dated 25<sup>th</sup> April, 2011]

### *Abatement of Restaurant/Hotel Services*

The Central Government has amended the Notification No.- 1/2006 – Service Tax dated 1<sup>st</sup> March, 2006 and abatement of 70% and 50% have been provided to (1) Restaurant and Bar Service and (2) Short term accommodation provided by Hotel respectively.

[Source: Notification No. 34/2011 – Service Tax dated 25<sup>th</sup> April, 2011]

**Codes for Restaurant/  
hotel Services**

Accounting Codes for 1)  
service provided by Restaurant

& 2) service provided by hotel  
has been allotted.

Accounting Codes for the  
purpose of payment of service  
tax are as follows:

Sl.No.	Taxable Services	Accounting Code		
		Tax Collection	Other Receipts	Deduct Refunds
(1)	(2)	(3)	(4)	(5)
1.	Service provided by a restaurant	00441067	00441068	00441069
2.	Service provided by a hotel	00441070	00441071	00441072

[Source: Circular No.136/5/2011-TRU,dated 20<sup>th</sup> April, 2011]

**Central Excise**

➤ **Case Laws**

**Confiscation and Penalty**

Non-mention of sub-rule in show cause notice – Show cause notice not mentioning sub-rule of Rule 25 of Central Excise Rules, 2002 however containing necessary ingredients of sub-rules (a), (b) and (d) ibid – Evidence on basis of which those ingredients provide also indicated – Objection only taken before Tribunal and not before – Assessee having full knowledge of ingredients/evidence and no prejudice caused – Notice and orders cannot be set aside merely for reason that contravened sub-rule not

mentioned – No prejudice caused, impugned orders cannot be set aside – Confiscation & penalty upheld. [2005 (190) E.L.T. 433 (S.C.) distinguished.

[Source: Raghunath International Ltd.Vs CESTAT 2011 (266) E.L.T. 432 (All)]

**Penalty on dealer for wrongful Cenvat credit availed by buyer**

Invoice issued without actually delivering goods – Abetment in enabling buyer to wrongly avail Cenvat credit – Provisions of Rule 26(2) of Central Excise Rules, 2002 introduced on 1.3.2007 not applicable to act committed prior thereto – However, penalty impossible as appellant concerned in selling or dealing with goods liable to confiscation – Rules 25(1)(d)

and 26(1) ibid applicable – Person purporting to sell goods cannot say that he was not concerned with selling of goods and had not contravened provision merely by issuing invoice – Invoice issued without delivery with intent to enable evasion – Finding not challenged, appellant liable to penalty.

[Source: Vee Kay Enterprises Vs Commissioner of Central Excise 2011 (266) E.L.T. 436 (P&H)]

**Cenvat/Modvat**

Inputs otherwise exempted – PVC film manufactured by assessee further also used in manufacture of leather cloth – Duty paid on such film used as credit in payment of duty on leather cloth – Demand of such credit taken contending that PVC films exempted under

Notification no. 217/86- C. E. – CEGAT while holding that the assessee had option to pay duty, proceeded to hold that restriction contained in third proviso to Para 2 of Notification *ibid* applicable and hence duty recoverable – SCN only in respect of credit reversal on ground that input exempted – Restriction in notification not applicable in case where duty paid on goods falling under Heading 39.20 of Central Excise Tariff and utilised for payment of duty on goods falling under Heading

59.03 *ibid* – Tribunal’s direction to communicate duty liability set aside .  
[Source: **Bhor Industries Ltd. Vs Union of India** 2011 (266) E.L.T. 444 (Bom.)]

### *Valuation*

Bought out items – Parts procured partly used in factory and some of them cleared directly to buyers without bringing same to factory – Goods viz. Tea dryer assembled in factory and subject to dry run and thereafter cleared in two

consignments – Value of parts gone into manufacture of dryers coming into existence in factory, includible – Value of parts supplied by Head office directly to buyers not includible as goods be treated only as traded goods – Section 4 of Central Excise Act, 1944.

[Source: **T&I Ltd. Vs. Commissioner of Central Excise, Dibrugarh** 2011 (266) E.L.T. 414 (Tri-Kolkata)]



## COMPANY LAW UPDATES

### ➤ Circulars

#### *Increase in authorized Capital is not liable to stamp duty under Indian Stamp Act, 1899 as applicable in Delhi*

Delhi High Court in the case of **S.E. Investment Limited (CO. APPL. (M) 38/2011 & CO. APPL. 293/2011)** held that increase in Authorised Capital is not liable to stamp duty under Indian Stamp Act, 1899 as applicable in Delhi.

[Source: Chartered Secretary Channel, April, 2011]

#### *Clarification Regarding Effective Date of Companies (Particulars of Employees) Amendment Rules, 2011*

The Ministry of Corporate Affairs has clarified that its notification of 31st March, 2011 regarding Companies (Particulars of Employees) Amendment Rules, 2011 raising the limit of employee's salary to be disclosed in the Directors Reports shall be applicable to all Director's Reports under Section 217 of

the Companies Act, 1956 approved by the Board of Directors **on or after April 1st, 2011**. It will be irrespective of the accounting year of the annual account, being approved by the Board.

[Source: MCA General Circular no. 23/2011 dated 03.05.2011]

#### *Clarification in respect of General Circular No: 2 /2011 dated 8<sup>th</sup> February, 2011 in respect of exemption u/s 212 (8) of the Companies Act, 1956.*

In this regard, it is clarified that Companies which desire to take benefit of exemption allowed under this circular would have to fulfill the conditions stipulated therein (including condition (ii) therein) even if they are unlisted. In other words, even an unlisted company would be required to prepare a consolidated financial statement to avail exemption.

[Source: MCA General Circular no. 22/2011 dated 02.05.2011]

#### *Approval of Ministry of Corporate Affairs for*

#### *appointment of agency for providing electronic platform for electronic voting under the Companies Act, 1956.*

It is further clarified that for the above purpose, **National Securities Depository Limited (NSDL) and Central Depository Services (India) Ltd (CDSL)** are being approved by the Ministry of Corporate Affairs subject to the condition that they obtain a certificate from Standardization Testing and Quality Certification (STQC) Directorate, Department of Information Technology, Ministry of Communications & IT, Govt. of India, Electronics Niketan, 6 CGO Complex, New Delhi – 110 003, INDIA. Once they obtain the same and inform the Ministry, they will be authorized to undertake these activities.

[Source: MCA General Circular no. 21/2011 dated 02.05.2011]

***E-Form No. 32 – Intimation to Registrar of Companies regarding particulars of appointment of Directors etc and changes therein in the company pursuant to section 303 (2) of the Companies Act, 1956 – filing of conflicting return by contesting parties.***

The above instructions are being hereby revised to the extent that all particulars filed by the companies in e-form 32 are being placed on records of the Registrar of Companies through the **STP (Straight thru process) process** as filed by the company and verified by the practicing professional, without prejudice to the rights of the parties to settle the dispute, if any, in a court of competent jurisdiction.

[Source: MCA General Circular no. 20/2011 dated 02.05.2011]

***Marking a company as having management dispute by Registrar of Companies under MCA-21 system***

It is clarified that the Registrar of Companies shall use this facility as under: –

(i) The Registrar of Companies shall mark a company as having management dispute in only those cases where the court or Company Law Board has directed to maintain the status-quo with reference to any e-forms including status of Directors in the company or

(ii) The Court or Company Law Board has granted any injunction or stay in taking the document on record and Registrar of Companies is a party in such court cases and/or the directions have been issued to the Registrar of Companies.

(iii) In other matter, where the Registrar of Companies is not a party and such orders have been passed and has not been served to the Registrar of Companies, it is for the parties to comply to such orders and in case of non-compliances, the law shall take its own course.

[Source: MCA General Circular no. 19/2011 dated 02.05.2011]

***Clarification regarding sending copies of Balance Sheets and Auditors Report etc., to the members of the company as required under section 219 of the Companies Act,***

***1956 through electronic mode***

It is hereby clarified that the company would be in compliance of sections 219(1) of Companies Act, 1956, in case, a copy of Balance Sheet etc., is sent by electronic mail to its member subject to the fact that company has obtained-

(a) e-mail address of its member for sending the Notice with Balance sheet, Profit & Loss Account, Auditor's Report, Director's Report, and Explanatory Statement etc through e-mail, after giving an advance opportunity to the member to register his e-mail address and changes therein from time to time with the company or with the concerned depository.

(b) Company's website display full text of these documents well in advance prior to mandatory period and issue advertisement in prominent newspapers in both vernacular and English stating that the copies of aforesaid documents are available in the website and for inspection at the Registered Office of the company during office hours. Website must be designed in a way so that

documents can be opened easily and quickly.

(c) In cases where any member(s) has not registered his e-mail address for receiving the Balance Sheet etc through e-mail, the Balance Sheet etc., will be sent by other modes of services as provided under section 53 of the Companies Act, 1956.

(d) In case any member(s) insist for physical copies of above documents, the same should be sent to him physically, by post free of cost.  
[Source: MCA General Circular no. 18/2011 dated 29.04.2011]

### ***Clarification regarding service of documents by e-mode instead of Under Posting certificate (UPC)***

It is hereby clarified that a Company would have complied with section 53 of the Companies Act, if the service of document has been made through electronic mode provided the company has obtained e-mail addresses of its members for sending the notice/documents through e-mail by giving an advance opportunity to every shareholders to register their e-mail address and changes

therein from time to time with the company.

In cases where any member has not registered his e-mail address with the company, the service of document etc will be effected by other modes of service as provided under section 53 of the Companies Act, 1956.

[Source: MCA General Circular no. 17/2011 dated 21.04.2011]

### ***Simplified Procedure for amalgamation of Government Companies U/s 396 of the Companies Act, 1956.***

Without prejudice to the generality of Section 396, it has now been decided that, in appropriate cases (applicable to govt. companies), simpler procedures shall be adopted for the amalgamation of Government Companies under section 396 of the Companies Act, 1956.

[Source: MCA General Circular no. 16/2011 dated 20.04.2011]

### ***Appointment of Cost Auditor by Companies***

In supersession of any earlier order/ circular issued in this regard, the procedure to be followed by the companies and cost auditor has been revised.

[Source: MCA General Circular no. 15/2011 dated 11.04.2011]

### ***Certification of e-forms under the Companies Act, 1956 by the Practicing professionals***

For this purpose, Ministry of Corporate Affairs has entrusted practicing Professionals registered as Members of the professional bodies namely, ICAI, ICSI & ICWAI with the responsibility of ensuring integrity of documents filed by them with MCA in electronic mode. Professionals are now responsible for submitting/certifying documents (to be signed digitally by them) and system would accept most of these documents online without approval by Registrar of Companies or other officers of the Ministry.

[Source: MCA General Circular no. 14/2011 dated 08.04.2011]

### **Clarification Regarding Easy Exit Scheme (EES)**

Ministry has received certain proposals for simplification in the procedures of Easy Exit Scheme (EES), 2011. The proposals have been examined in the Ministry and the revised simplified procedures for dealing with applications under Easy Exit Scheme (EES).

[Source: MCA General Circular no. 12/2011 dated 07.04.2011]

### **Allotment of Director Identification Number (DIN) under Companies Act, 1956**

Ministry now as a step towards simplification in allotment of DIN, is considering to allot all DIN applications online. At present, the PAN of the applicant is not a mandatory field in DIN eform-1. In order to examine DIN-4 eform through the system and to avoid duplicate DIN, it has been decided that all existing DIN holders who have not furnished their PAN earlier at the time of obtaining DIN, are required to furnish their PAN

by filing DIN-4 eform by 31<sup>st</sup> May, 2011.

[Source: MCA General Circular no. 11/2011 dated 07.04.2011]

### **➤ Notifications**

#### **MCA Notification with respect of change in eforms 2, 3, 18, 23C, 24A and 32**

The Central Government hereby amend the Companies (Central Government's) General Rules and Forms, 1956 by substituting **Form 2, Form 3, Form 18, 23C and Form 32 in Annexure A** as effective from 01.05.2011.

These rules may be called the Companies (Central Government's) General Rules and Forms (Amendment) Rules 2011.

[Source: MCA Notification no. G. S. R. (E) dated 29.04.2011]

#### **MCA Notification with respect of Companies Regulations, 1956**

Central government hereby amends Companies

Regulations, 1956 by substituting clause (d) of Regulation 2 for the definition of Regional Director.

These rules may be called as Companies (Amendment) Regulations, 2011.

[Source: MCA Notification no. G. S. R. 304(E) dated 06.04.2011]

#### **MCA Notification with respect of Amendment in Director's Relatives (Office or Place of Profit) Rules, 2003**

Central government hereby amends Director's Relatives (Office or Place of Profit) Rules, 2003 by substituting Rule 3 and Rule 7 respectively. As per the said amendments the limit of Rs.50,000/(Rupees Fifty Thousand Only) has been increased to Rs.2,50,000/- (Rupees Two Lacs Fifty Thousand Only).

These rules may be called as Director's Relatives (Office or Place of Profit) Amendment Rules, 2011.

[Source: MCA Notification no. G. S. R. 303(E) dated 06.04.2011]

## SEBI& RBI UPDATES

### ➤ Circular

#### *Applications Supported by Blocked Amount (ASBA) facility*

SEBI has decided that non-retail investors i.e. Qualified Institutional Buyers and Non-Institutional Investors, making application in public/ rights issue shall mandatorily make use of ASBA facility. In this regard, disclosures shall be made in the offer document such as in issue procedure section as part of payment instructions. Merchant Bankers shall ensure that appropriate disclosures are made in the offer document in this regard.

[Source: Circular no. CIR/CFD/DIL/1/2011 dated 29.04.2011]

#### *Advance Remittance for Import of Goods – Liberalization*

With a view to liberalize the procedure for obtaining a bank guarantee in case of advance remittance by Authorized Dealer Category I, Reserve Bank of India has decided to enhance the limit of USD 100,000 to USD 200,000 or its

equivalent, with immediate effect for importers (other than a Public Sector Company or a Department/Undertaking of Central/State Governments where the requirement of bank guarantee is to be specifically waived by the Ministry of Finance, Government of India for advance remittances exceeding USD 100,000 or its equivalent).

[Source: RBI/2010-11/493 A.P. (DIR Series) Circular No. 56 dated 29.04.2011]

#### *Foreign investments in India by SEBI registered FIIs in other securities*

Reserve Bank of India has enhanced the limits of investments by Foreign Institutional Investors (FIIs) in listed non convertible debentures / bonds, with a residual maturity of five years and above, and issued by Indian companies in the infrastructure sector, up to USD 40 billion (with a sub limit of USD 25 billion for investment in listed non-convertible debentures / bonds issued by corporate in the infrastructure sector).

Further, such investment by FIIs in listed non-convertible debentures / bonds would have a minimum lock-in period of three years. However, FIIs are allowed to trade amongst themselves during the lock-in period. It has also been decided to allow SEBI registered FIIs to invest in unlisted non-convertible debentures / bonds issued by corporates in the infrastructure sector, provided that such investment is as per the aforementioned terms and conditions.

[Source: RBI/2010-11/492 A.P. (DIR Series) Circular No. 55 dated 29.04.2011]

#### *Liquidation of Post-Shipment Rupee Export Credit*

It has now been decided that in order to reduce the cost to exporters (i.e. interest cost on overdue export bills), exporters with overdue export bills may also extinguish their overdue post shipment rupee export credit from their rupee resources. However, the corresponding GR form will remain outstanding and the

amount will be shown outstanding in XOS statement. The exporter's liability for realisation would continue till the export bill is realised.

[Source: RBI/2010-11/477 DBOD. Dir. BC. No. 85 /04.02.001/2010-11 dated 18.04.2011]

*Overseas forex trading through electronic / internet trading portals*

Overseas foreign exchange trading has been introduced on a number of internet /electronic trading portals luring the residents with offers of guaranteed high returns based on such forextrading. It is clarified that any person resident in India collecting and effecting / remitting such payments directly /indirectly outside India would make himself/ herself liable to be

proceeded against with for contravention of FEMA, 1999 besides being liable for violation of regulations relating to Know Your Customer (KYC) norms / Anti Money Laundering (AML) standards.

[Source: RBI/2010-11/472 A.P. (DIR Series) Circular No. 53 dated 07.04.2011]



## CORPORATE FINANCE

### ➤ Latest News

#### **MERGER & ACQUISITIONS**

##### **RNM marks entry into M&A advisory with SSFHL Sale**

World class flexible rubber hoses manufacturer, based in Greater Noida, Super Seals Flexible Hose Limited (SSFHL) was acquired by Kolkatta based Weird Industries Group in April 2011. The deal was managed by RNM & Associates, a boutique investment banking firm based in New Delhi, with branches in Gurgaon and Bangalore which is active in M&A, Private Equity placement, Debt Syndication and Corporate Finance Consultancy.

As per Mr.Raghu Marwah, Partner of RNM & Associates “M&A activity in the SME space is picking up with the increasing importance of technology and R&D in industry today, access to which is limited at the SME level without necessary

overseas alliances or partnerships”.

[Source: Deal dated 6<sup>th</sup> April 2011]

#### **INVESTMENT BANKING**

##### **Rabobank Gets RBI Nod for Banking**

Dutch lender Rabobank International Holding BV has got the nod from Reserve Bank of India to set up banking operations in the country. Currently, Rabobank is present in India through a wholly owned subsidiary, Rabo India Finance (RIF), which is registered as a Non-Banking Finance Company (NBFC). The 110-year-old food and agriculture bank, which has a triple-A rating, holds 4.9 per cent stake in Yes Bank down from 15.9 per cent. Rabobank is the sponsor of India Agribusiness Fund, a \$120 million food &agri sector private equity fund in Asia. The fund is sponsored by Rabobank with a 25 per cent share of the committed capital

[Source: The Hindu Business line, 4<sup>th</sup> April 2011]

#### **VENTURE CAPITAL**

##### **Norwest And IDG Ventures Invest Rs 22 Cr In E-Learning Company iProf**

iProf Learning Solutions India Pvt. Ltd, a Noida-based e-learning company and the maker of probably India's first personal education tablet and an operator of a chain of Wi-Fi-enabled e-learning centers across the nation, has raised Rs. 22 crore in Series A funding from Norwest Venture Partners (NVP) and IDG Ventures India (IDGVI). The stake sold is not disclosed.iProf claims to offer India's first personal education tablet and delivers study material in multiple formats such as audio-video lectures, animations, structured tests, solutions and performance analysis. Students will be able to download various education content from retail hotspots called iStudy Zones. Presently nearly 20 iStudy Zones are operational and will reach 100 by the end of 2011.

[Source: Reuters, 20<sup>th</sup> April 2011]

### **IFC Provides \$15.6M Loan For Wind Turbine Assembly Unit**

International Finance Corporation (IFC), a member of the World Bank Group, will provide \$15.6 million loan to India's Gamesa Wind Turbines Pvt Ltd to help build a wind-turbine assembly facility that will help diversify India's energy mix and reduce its greenhouse gas footprint. IFC's loan will support Gamesa's plans to scale up its assembly capacity in India over the next two years

[Source: News Politan, April 20, 2011]

### **Matrix Partners India Raises Second Fund Of \$300M**

Matrix Partners India announced today that it had closed a \$300 million second fund. With the closing of this fund, the firm's total assets under management will be \$600 million across two funds.

Matrix India's portfolio companies include Muthoot Finance (gold loan NBFC), Tree House Education (preschools and K-12 school management), BSFL/BASIX

(microfinance institution), Chetas Control Systems (water metering solutions), Center for Sight (eye care chain), FIITJEE (engineering test preparation company) and Ver se Innovation (mobile classifieds)

[Source: Livemint April 29, 2011]

### **Yatra Raises Rs 200Cr in Pre-IPO Round**

Gurgaon-based Yatra Online Pvt Ltd, one of the top three online travel agencies (OTA) in India, has raised funds to the tune of Rs 200 crore to rev up its hotels and holiday booking business. The funding round is led by San Francisco-based Valiant Capital Management, with Norwest Venture Partners and Intel Capital participating as well. This is a pre-IPO round and there will not be a further round of funding by Yatra, which plans to go public in 2013

[Source: Vccircle, 20 april 2011]

### **Hyderabad-Based Lokesh Machines Raises \$2M From IFCI VC Funds**

Lokesh Machines Ltd, a Hyderabad-based small-sized machine tools maker, has

raised \$2.08 million fund from IFCI VC Funds Ltd. In 2005, Gujarat Venture Capital Fund, managed by GVFL Ltd, sold its entire 8.5 per cent stake in Lokesh Machines for \$0.4 million (Rs 17.5 million) to the promoters of the company in a buyback. Founded in 1984, Lokesh Machines is engaged in design, development, production and supply of machine tools, jigs, fixtures and accessories needed for precision engineering. The company has designed special purpose machines for Ashok Leyland, Bajaj Auto, Escorts, TELCO, Mahindra & Mahindra, Kinetic Engineering and Birla Yamaha. It has also tied up with GROB-WERKE GmbH & Co. KG, Germany, for manufacturing of horizontal machining centre.

[Source: Theventurebay, April 29, 2011]

## **PRIVATE EQUITY**

### **ASK Real Estate Puts Rs 50Cr into Chennai SPV**

ASK Real Estate Special Opportunities Portfolio 1, a realty-focused private equity fund, has invested Rs 50 crore in a company floated by

Chennai's Real Value Group. Real Value Group's SPV is developing a residential project of 6.75 lakh sq. ft., spread across 4.32 acres at Kottivakaam in Chennai. [Source: Vccircle, April 27, 2011]

### **Avigo Capital Invests Rs 100 Cr For 9.27% In Super Religare Labs**

Avigo Capital Partners, an SME focused private equity fund, has picked up 9.27% of the post investment equity share capital of Super Religare Laboratories Ltd (SRL) for Rs 100 crore in a pre-IPO deal. SRL, presently a privately held company of billionaire brothers Malvinder and Shivinder Singh who are selling their majority stake to a public listed group firm Fortis Healthcare (India), offers diagnostic testing (including pathology and radiology), preventive care testing and clinical research trial testing has a strong franchise

[Source: The Economic Times, April 18, 2011]

### **Future Ventures Invests Rs 37.5 Cr in AmarChitraKatha**

Future Ventures is picking up a little over 26% stake in edutainment media firm AmarChitraKatha Private Limited (ACK) for Rs 37.5 crore, valuing the firm at Rs 140 crore (~\$ 32 million) Future Ventures is buying around 0.12 million shares through two tranches of Rs 15 crore and Rs 22.5 crore.

[Source: India weekly, April 19, 2011]

### **Fidelity Growth Partners Invests \$13.5M in Transpole Logistics**

Leading Indian growth equity PE firm, Fidelity Growth Partners India (FGPI), has invested \$13.5 million for a significant minority stake in Transpole Logistics Pvt Ltd, a Delhi-based supply chain solutions firm. The company has a presence across India, China, Hong Kong, Korea and South East Asia. It offers asset light, integrated logistics solutions with services such as freight

forwarding, warehousing, distribution, project logistics, last mile operations, and 3PL (third party logistics) advisory.

[Source: Reuters, April 26, 2011]

### **Providence Equity Partners Invests Rs 260 Cr In UFO Moviez**

Providence Equity Partners, a global private equity firm specialised in investments in media, entertainment, communications and information services companies, has put in around Rs 260 crore in a mix of primary and secondary investment in UFO Moviez India Ltd. which claims to be the largest chain of satellite based digital cinemas in the world with more than 1800 screens across India. It has close to 25,000 installations across the country. International (an affiliate of Apollo Tyres) as well as 3i Group, a leading private equity firm and an early investor in UFO, will continue to remain significant shareholders

[Source: Business Standard, April 19, 2011]

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