

RNM ALERT

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U.N. Marwah

Dear Readers,

We are pleased to inform all our esteemed readers that our associate concern, RNM & Associates which is active in corporate finance activities has closed its first M&A transaction in the auto component sector. We are moving ahead rapidly on the debt syndication front, having already closed four debt deals with a combined fund raise of about 7 million USD. The formal approval of RNM & Associates from Religare Finvest Ltd. and India Bulls Housing Finance Ltd / India Bulls Financial Services Ltd as a Channel Partner has also been received.

That with effect from May 1, 2011 the exemption earlier granted to Chartered Accountants acting in their professional capacity representing the client before any statutory authority in the course of proceedings initiated under any law for the time being in force, by way of issue of notice, has ceased. In other words, service tax would be applicable on all assessment, appeal and litigation matters which was earlier exempt from tax. It is therefore advisable to make all outstanding payments in regard to such professional matters prior to May 1, 2011 to avoid payment of service tax.

A new Annual Return form has been issued by the RBI to be filed by all companies, entities which have received Foreign Direct Investment (FDI) to replace the earlier Form FC-GPR (Part B). In other words, all returns for the financial year ended March 31, 2011 should be in the new Annual Return.

The new FDI Policy was issued by the DIPP, Ministry of Commerce & Industry effective from April 1, 2011. The major change in the said Policy is in regard to the approval of the FIPB which was earlier required under the provisions of Press Note 18/1998 and Press Note 1 of 2005 for FDI companies with an existing Joint Venture in the same or allied field from establishing another entity in India, commonly referred to as the 'Existing Venture/ Tie-up condition'. The said approval is now not required which is a major concession for FDI and should go a long way in instilling further confidence among overseas investors.

Regards,

U.N. Marwah

For and behalf of the RNM Alert Editorial Board

CONTENTS

Direct Tax

- ***Case Laws***
 - Case on Agricultural Land 4
 - Cases on Income Deemed to accrue or arise in India 4 - 5
 - Profits & Gain from Business & Profession 5 - 6
 - Capital Gain 6
 - Undisclosed Income 6 - 7
 - Carry forward & Set off of Losses 7
 - Tax Assessment, Search & Seizure 7 - 8
 - Deduction of Tax at Source 8 - 9
 - Tax Administration 9 - 10
 - Penalty 10
 - Miscellaneous 10 - 11
- ***Notification***
 - New Form 13 11

Indirect Tax

Central Excise & Customs

- ***Case Laws***
 - Confiscated Goods 12
 - MRP Based Valuation of Tubes 12
 - Import – Export Code (IEC) 12 - 13
 - Document for availing credit 13
 - Denial of SSI Exemption 13
- ***Service Tax***
 - ***Case Laws***
 - Adjustment of excess Tax paid 13
 - Exemption of refund Export of Goods 13 - 14
 - Limitation for Refund 14
 - Cenvat credit of Service tax paid by job work 14
 - Refund of Service Tax on Transportation 14
 - No Service tax on Cashless Health Insurance 14
 - ***Notification***
 - Point of Taxation Rules, 2011 14

Company Law

Circulars

- Filing of Balance Sheet and Profit and Loss Account in eXtensible Business Reporting Language (XBRL) mode 15
- Prosecution of Directors 15
- Payment of MCA Fees – electronic mode 15
- Process of Incorporation of Companies (form 1) & establishment of principal place of business in India by foreign Companies (form -44) – Procedure simplified 15 - 16
- Payment of Commission to Non-Whole time Directors of Co u/s 309(4)(b) of the Cos Act, 1956 16
- Simplification of DIN Rules 16
- Revised Schedule VI (Shall be effective from 01-04-2011) 16
- Clarification in respect of Circular No. 2/2011 dt 8th Feb'11, regarding direction u/s 212 (8) of Cos. Act, 1956 16 - 17
- Direction u/s 212 (8) of the Companies Act, 1956 17

Latest Notifications/ News

- Amendment in Form 61- Cos. (Central Govt's) General Rules & Forms, 1956 (amendment) Rules, 2011 17
- Notification Revising DIN – 1 & DIN – 4 form & requirement of undertaking – Amendment Rules, 2011 17
- Delegation of powers & functions of Registrar of Cos. On selective provisions 18
- Delegation of powers & functions of Regional Directors on selective provisions 18 – 19
- Revision in Form 2 – Cos. (Central Govt's) General Rules & Forms, 1956 (amendment) Rules, 1956 19

RBI UPDATES & FEMA UPDATES

Latest Notifications/ News

- Non Banking Financial (Deposit accepting or holding) Companies Prudential Norms (Reserve Bank) Direction, 2007 Insertion of New Paragraph – 19A 20
- Introduction of Annual Return on Foreign Liabilities & Assets reporting by Indian Cos. & discontinuation of the Part B form FC-GPR 20 - 21

Corporate Finance

Latest News

- Private Equity 22
- Venture Capital 23
- Investment Banking 23 - 24

DIRECT TAX

➤ Case Laws

Case on Agricultural Land

S.2(14)-What are agricultural lands?

Assessee claimed exemption from capital gains on transfer of land which in revenue records was classified as Coconut Grove. Purchaser intended to put up a beach resort. The use to which the purchaser would put could not be a factor for the inference that the land is not agricultural in the hands of the assessee at the time of transfer. It was only the purchaser, who had got it transferred for non agricultural use. In these circumstances, the finding of the Tribunal that the assessee was not liable for capital gains taxes could not be characterized as perverse, so as to justify the interference on the part of the High Court.

[Source: CIT v. Smt. Debbie Alemao [2011] 331 ITR 59 (Bom)]

Cases on Income Deemed to accrue or arise in India

No income is deemed to accrue in India from use of

satellite outside India to beam TV signals into India even if bulk of revenue arises due to viewers in India

For income to be taxable u/s 9(1)(i), the carrying on of operations in India is a sine qua non. The assessee had no presence in India. The signals were uploaded and downloaded outside India. *Merely because the footprint area included India and programmes were watched by Indian viewers did not mean that the assessee was carrying out business operations in India.*

[Source: Asia Satellite Telecommunications Co vs. DIT (Delhi HC) ITA No.131 of 2003 with ITA No.134 of 2003]

S.9(1)(i) - Income deemed to accrue or arise in India - Tax Deduction at Source – Technical (S.40(a)(i), 194J)

Assessee dealer for Xerox India Ltd. (XIL), authorized to sell and otherwise, promote latter in specified territories. Apart from sales, assessee was also required to render service support to customers, i.e. purchasers of product of XIL. Assessee claimed that payments made to XIL could not be treated as “fees for

technical services”. Tribunal held that the payment in question amounted to fees for technical services hence disallowance made by the lower authorities were justified. [Source: Divya Business Systems (P) Ltd. vs. ACIT (2011) 43 SOT 155 (Cochin)]

S.9(1)(vii) - Income deemed to accrue or arise – Validity challenged - Parliament’s power to make laws with extra - Territorial effect

The constitutional validity of section 9(1)(vii)(b) was challenged by way of an appeal to the Supreme Court so as to determine the extent to which laws enacted by Parliament can have extra-territorial effect under Article 245. The Constitution Bench held that Parliament is constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) in or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, well-being of, or security of inhabitants of India, and Indians. In all other

respects, Parliament may enact legislation with extraterritorial effect. All that is required is that the connection to India be real or expected to be real, and not illusory or fanciful. Parliament can only make laws for India and any law which has no impact on or nexus with India would be ultra-vires.

[Source: GVK Industries Ltd vs. ITO (Supreme Court – 5 Judge Bench) CIVIL APPEAL NO. 7796 OF 1997]

Profits & Gain from Business and Professions
Income from commercial complex – Whether business of property income? - Business income

Assessee engaged in the business of heavy pipes and coolers took a plot of land from the Lucknow Development Authority for construction of a commercial complex, Let it out to others after providing all the necessary amenities required for such complex. It was assessed as income from business in the past. Notwithstanding the fact that the principle of estoppel and res judicata could have no application to tax proceedings, consistency is expected, when the facts are not different. Even on merits, it found after a brief reference to a number of

decisions on the subject that **the income from the complex cannot be put on par with bare rent from property and that such income is assessable as profits and gains of business.**

[Source: CIT v. Goel Builders [2011] 331 ITR 344 (All)]

S.28(v) - Business Income – Income from waiver of loan – Capital or Revenue Receipt - Depends on whether loan was used for Capital or Revenue purposes

It was held that income from waiver of loan depends on the purpose for which loan is taken. In case the loan was taken for acquiring a capital asset, the waiver thereof would not amount to any income exigible to tax under section 28(iv) or 41(1). Whereas, if the loan was taken for a trading purpose and was treated as such from the very beginning in the books of account, its waiver would result in income more so when it was transferred to the P&L A/c in view of SundaramIyengar 222 ITR 344 (SC).

[Source: Logitronics Pvt. Ltd. vs. CIT (High Court - Delhi)(www.itatonline.org)]

S.40(a)(i) - Amounts not deductible- Non Resident - Tax Deduction at Source -

Technician outside India - (S. 195)

Payment made outside India for services rendered by non resident technicians outside India no disallowance can be made as provisions of section 195 is not applicable.

[Source: CIT vs. International Creative Foods (P.) Ltd. (2011) 49 DTR 150 (Ker.)]

S.28(iv)- Business Loss - Bad Debt - Claim for “Business loss” maintainable Website Development Expense is not Capital Expenditure

The assessee, engaged in investment activities, advanced Rs. 27.97 lakhs for development of a website. As the advance was not recoverable, the assessee wrote off the amount and claimed it as a “bad debt” even though the conditions of section 36(1)(vii) & 36(2) were not satisfied. HELD, that (i) Though the claim as a ‘bad debt’ is not allowable, the assessee is entitled under Rule 27 to support the CIT(A)’s order on the ground that the amount should be allowed as a ‘business loss’.

Further as the expenditure was abortive, no capital asset has in fact been acquired and even if the website had materialized, it does not result in an advantage of an enduring nature or in the

capital field as it is only for the day-to-day running of the business and provision of information.

[Source: Dy. CIT vs. Edelweiss Capital Ltd. (ITAT - Mumbai) Source: www.itatonline.org]

Business expenditure - Interest on borrowing for financing subsidiaries

Where borrowing is made for financing subsidiaries interest-free, the **test for allowance of deduction of interest on borrowings by the assessee is whether such advance was made for business consideration.** Merely because it is a wholly owned subsidiary, it could not be disallowed. The onus, no doubt, lies on the assessee to prove that the advance was prompted by commercial expediency. But where the assessee had established that it had adequate non-interest bearing funds by way of share capital and reserves at the time of advance and the loan was also prompted by business consideration, the High Court found that it could not interfere with these findings of the Tribunal to allow the deduction on facts

[Source: CIT v. BhartiTeleventure Ltd. [2011] 331 ITR 502 (Delhi)]

Capital Gains

S.54 is no bar for more than one residential house

Relief is not restricted to reinvestment in a single residential house. In this case, there were as many as four residential units, but all in the same building in pursuance of a development agreement. The assessee was held entitled to relief.

[Source: CIT v. Smt. K.G. Rukminiamma [2011] 331 ITR 211]

S. 54EC relief available if cheque issued within 6 months of transfer even if cheque cleared, and bonds issued, after 6 months

[Source: KumarpalAmrutlalDoshi vs. DCIT (ITAT Mumbai) ITA NO.1523/MUM/2010]

Capital Gains - Business Income – Shares - Despite high volume & short holding period - Shares Gain is STCG – [S. 28(iv)]

The assessee offered income by way of Long Term Capital Gain, Short Term Capital Gain, speculative profit and profit from future trading. In such a case, where shares are held for several years and so assessee had acted as investor and not trader, the said the gain shall be assessable as long term capital gain. In similar manner where there is no intra-day trading, shares are held for period of 2 to 5 months and there are no

borrowings, the same shall be assessed as Long Term Capital Gain.

[Source: [ACIT vs. Naishadh V. Vachharajani \(ITAT Mumbai\)](#) I.T.A. No. 6429/Mum/2009]

Undisclosed Income

S.68 - Addition u/s 68 on account of unexplained share application money - Principles of Law laid down

(i) **Initial burden is on assessee to explain the “nature & source” of the credit and to do so, the assessee is required to prove**

(a) **Identity of shareholder** which can be proved by either (if individual) producing him before the AO or by way of documents, registered address, PAN etc;

(b) **Genuineness of transaction** which can be shown from the fact that the money has been received from the shareholder. **If the money is received by cheque and is transmitted through banking or other indisputable channels, the genuineness of transaction would be proved.**

Other documents showing the genuineness of transaction could be the copies of the shareholders register, share application forms, share transfer register, etc;

- (c) **Creditworthiness or financial strength of the creditor/subscriber** which can be proved by producing bank statement of the creditors/subscribers showing that it had sufficient balance in its accounts to enable it to subscribe to the share capital.

Once these documents are produced, the assessee would have satisfactorily discharge the onus cast upon him. AO cannot burden the assessee merely on the ground that summons issued to the investors were returned back with the endorsement “not traceable”;

- (iii) There is an additional burden on the Department to show that even if share applicants did not have the means to make investment, **the investment made by them actually emanated from the coffers of the assessee** so as to enable it to be treated as the undisclosed income of the assessee. **In the absence of such finding, addition cannot be made u/s 68 in the hands the assessee.**

[Source; *CIT vs. Oasis Hospitalities Pvt. Ltd. (Delhi HC)* ITA No. 2093 & 2095 of 2010]

Carry Forward & Set Off of Losses

S.72 - Carry forward and set off of Business Loss - Dividend Income - Shares held for business

Section 72(1)(i) does not use the word “assessable under the ‘head’ profits & gains of business”. The answer to the question as to whether the securities formed part of the trading assets of the business and the income there from was income from the business has to be decided on commercial principles and not on the basis of the classification of ‘heads of income’ in section 14. Though for the purpose of computation of the income, dividends are assessable under the head “Other Sources”, it does not cease to be part of the income from business if the securities are part of the trading assets. Accordingly, the assessee is eligible for set-off of dividend income as against business loss.

[Source: *Gangan Trading Co. Ltd. vs. Dy. CIT (ITAT - Mumbai)* www.itatonline.org]

Under Expl.to S.73 even delivery-based loss on shares is “speculation” loss

Assessee company, engaged in the business of purchase & sale

of shares suffered a loss of Rs. 1.41 crores and claimed that this could not be treated as “speculation loss” under the Explanation to s. 73. The AO, CIT (A) & [Tribunal {85 ITD 745 \(Kol\)}](#) rejected the assessee’s claim. On further appeal, HELD dismissing the appeal: (i) The Explanation to s.73 **creates a fiction** that the loss suffered by certain companies from the business of purchase & sale of shares shall be **deemed to be speculation loss.** (ii) The fact that the assessee settled the transactions by physical delivery is irrelevant (iii) The fact that the Explanation to s. 73 was introduced to curb manipulation does not mean that it has to be confined to only those cases in view of the clear language of the provision. [Source: [Paharpur Cooling Towers Ltd vs. CIT \(Calcutta High Court\)](#) ITA 256 OF 2002]

Tax Assessment, Search & Seizure

S.147 - Reassessment - Non issue of Notice - [S. 143(2)]

It is mandatory not merely procedural for the Assessing Officer to issue notice under section 143(2). If the notice is not served within the prescribed period, the assessment order is invalid.

[Source: *UKT Software Technologies vs. ITO (ITAT - Delhi)* www.itatonline.org]

S.143(3) - Assessment - Addition - Adhoc Addition - Self made vouchers

Adhoc disallowance cannot be made simply holding that self made vouchers cannot be taken as correct and proved, unless some of such vouchers are proved as bogus or fake.

[Source: *ITO vs. Bajrang Trading Company (2011) Tax World Vol. XLV Part-1 Page 33 (January, 11)*]

S.148 - Reassessment - Service of Notice - Second Notice - Validity of Assessment - Limitation from first notice

It was held that first notice sent by speed post as permitted by section 282 is presumed to have been duly served upon the assessee and was valid. As the first section 148 notice was valid and reassessment proceedings were pending, the second section 148 notice is not an irregularity but a nullity. (Ranchhodas Karsandas 26 ITR 105 (SC) and Jai Dev Jain 227 ITR 301 (Raj.) followed. Thus, the limitation period reckoned with reference to the first notice.

[Source: *Sanjay Kumar Garg vs. ACIT (ITAT Delhi) I. T. A. Nos. 1501, 1502 & 3531 to 3534 (Del) of 2009*]

S. 148 - Reassessment - Sanction of Commissioner - Application of Mind - (S. 151)

A material fact which is not in existence right up to the time of assessment cannot possibly be disclosed. Therefore, a fact which comes into existence subsequent to the making of the assessment cannot be a material fact within the purview of section 147. The duty to disclose material facts necessarily postulates existence of a thing or material. If a material is not in existence or if a material is such of which the assessee had no knowledge there would be no duty to disclose such material.

[Source: *The Central India Electric Supply Co. Ltd. vs. ITO (Delhi High Court)*]

[Source: www.itatonline.org Editorial: (Tirath Ram Ahuja (HUF) 306 ITR 173 (Del.) followed)]

S.154 AO entitled to issue s. 154 notice, drop it, & issue s. 148 notice

Though the principle of constructive res judicata was made applicable by the Madras High Court in *EID Parry* 216 ITR 489 (Mad.) that the Assessing Officer having

initiated rectification proceedings under section 154 should stick to the same only and cannot drop that and proceed under section 147 is not acceptable. But the fact that the Assessing Officer invoked section 154 and dropped it does not affect the validity of reassessment under section 147.

[Source: *CIT vs. M/s India Sea Foods (Kerala High Court)* ITA.No. 128 of 2010]

Protective assessment can be framed u/s 158BC & 158BD

Even when there is no specific provision in the Act for protective assessment, the AO has power to make protective assessment under certain circumstances. **This principle of law will apply to block assessment proceedings u/s 158BC & 158BD as well and the AO has the power to make a block assessment order on a protective basis.**

[Source: *CIT vs. Mahindra Finlease Pvt Ltd (Delhi High Court)* ITA NO. 981 and 1123 OF 2008]

Deduction of Tax at Source

S.194C - Deduction at Source - Printing Material-Payments to contractor.

Payment made for purchase of printed packing material to

suppliers, no work involving skill or secrecy, it being sale, section 194C is not attracted.

[Source: *ITO vs. Mother Dairy Food Processing Ltd.* (2011) 7 ITR 16 (Trib.)(Delhi)]

S.201 - Assessee in default – Limitation - Deduction at Source - Tax duly paid by payee

Maximum time limit for initiating and completing the proceedings under section 201(1) has to be at par with the time limit available for initiating and completing the assessment / reassessment of the payee; impugned order under section 201(1) passed by the Assessing Officer within the period of six years from the end of the relevant assessment year is not time barred. Person responsible for deduction tax cannot be treated as an assessee in default in respect of tax under section 201(1) if the payee has paid the tax directly.

[Source: *ACIT vs. Merchant Shipping Services (P) Ltd.* (2011) 49 DTR 97 (Trib.)(Mum.)]

Tax Administration

CBDT Circular on monetary limits for filing appeals does not apply to pending appeals

The CBDT issued [Circular dated 15.5.2008](#) prescribing monetary limit for filing of

appeals by the department before appellate authorities. The Circular does not apply to appeals filed prior to the date of the said circular, held that the Circular though not retrospective would apply to pending appeals. [Circular dated 15.5.2008](#) laying down monetary limit controls the filing of the appeals and not their hearing. There is no scope for reading the circular as being applicable to pending appeals.

[Source: [CIT vs. M/s Varindera Construction Co \(P&H High Court – Full Bench\)](#) ITA No. 209 of 2003 (Contrary Judgement of Delhi High Court also)]

S.260A - Appeal – Monetary Limit - CBDT Circular - Filing Appeals - Pending Appeals

The Department filed an appeal in the year 2008 where the tax effect was less than Rs. 10 lakhs. The question arose whether in view of Instruction No. 3/2011 Dated 9-2-2011 the appeal was maintainable. HELD dismissing the appeal: In view of *CIT vs. P. S. Jain & Co.* which followed *Pithwa Engineering* 276 ITR 519 (Bom.) & *Ashok Patel* 317 ITR 386 (MP) and where it was held that the CBDT Circular imposing limits on the filing of appeals by the department

applied to pending appeals, Instruction No. 3/2011 Dated 9-2-2011 also applied to pending appeals and as the tax effect was less than Rs. 10 lakhs, the appeal was not maintainable.

[Source: *CIT vs. Delhi Race Club Ltd.* (Delhi High Court) Source: [www.itatonline.org](#)]

S.263 - Revision of orders prejudicial to revenue – Penalty - Two Views

The Assessing Officer dropped the penalty proposal holding that appeal against the quantum is pending before the High Court. The Commissioner of Income Tax revised the order. The Tribunal held that the view of Assessing Officer cannot be held to be erroneous in dropping penalty proceedings. The Assessing Officer can impose penalty even after appeal is determined by High Court. Two views possible hence revision was held to be not valid.

[Source: *V. K. Natesan* (2011) 128 ITD 81 / 49 DTR 233/135 TTJ 257 (Cochin)(TM)]

Due to consistency principle, CIT not permitted to change view & revise u/s 263 without changed circumstances

Assessee regularly entered into transactions of purchase & sale of units which had been

examined by the department in the earlier years and accepted as being on capital account. In AY 1992-93, the assessee entered into similar transactions which led to a capital loss of Rs. 3.15 crores which was allowed by AO. CIT passed an order u/s 263 On appeal by the department, HC HELD dismissing the appeal: **As the department had examined the fundamental nature of the transaction in the earlier years and its nature remained unchanged, the department could not have changed its view as regards the nature of the transaction by dubbing it as erroneous.**

[Source: CIT vs. Escorts Ltd (Delhi High Court) ITA No.14/1999]

S. 263

Where AO has called for necessary details from the assessee by issuing questionnaires and the assessee had produced the books of account and other details and there being no infirmity or erroneousness in the order of the AO, CIT was not justified in invoking s. 263.

[Source: Raj Shyam constructions Pvt. Ltd. Vs. Asst. Commissioner of Income Tax. (2011) 135 TTJ (Del) (UO) 33]

Penalty

S. 271(1)(c)

If claim has been made in a transparent manner without concealing any material fact and by giving all the necessary details in the documents accompanying the return then merely because the interpretation canvassed by the assessee is rejected, it cannot be said that the assessee's claim is not bona fide. As long as there is a reasonable explanation for making a claim or resorting to an interpretation, penalty under s. 271(1)(c) cannot be imposed – This is not a case where the assessee has made a claim which is clearly inadmissible or contrary to the prevailing legal position- Therefore, the facts and circumstances of the case do not warrant or justify imposition of penalty u/s 271(1)(c).

[Source: Pfizer Pharmaceuticals (India) Pvt. Ltd. Vs. Dy. Commissioner of Income Tax(2011) 135 TTJ (Mumbai) 337]

S.276B – Prosecution - Prior notice for director as principal officer.

A director was sought to be prosecuted for failure to deposit the tax deducted at source punishable under section 276B. A director to be prosecuted would be required to be shown as a person in

charge of day-to-day affairs of the company or that he has consented or connived at the offence. But in the case of a company, the principal officer is the primary person against whom an action could ordinarily lie under the income tax law. It was in this context that the High Court held that **it is the requirement of law that the notice to treat the director as a principal officer would be required in the light of section 204, which makes the principal officer responsible for obligations relating to tax deduction at source**

[Source: ITO v. Delhi Iron Works (P) Ltd. [2011] 331 ITR 5 (Delhi)]

Miscellaneous

AO can lift veil & determine legal effect but cannot ignore legal effect on ground of “substance”

Assessee borrowed money from a sister concern and paid interest therein @ 18% per annum. The funds were used to purchase shares from a sister concern which carried dividend @ 4%. The AO & CIT(A) followed McDowell 154 ITR 148 (SC) & disallowed the claim for interest u/s 57(iii) on the ground that *no prudent person would borrow funds at*

18% to make an investment which yielded 4% and that the transaction was “*clear cut colourable dubious device*”. Reversed by Tribunal on the ground that the *transaction was bona fide and not sham*. HELD by the Larger Bench: While it is not unfair to borrow money from one concern and invest it in another concern for the purpose of profit or income,

the assessee must act bona fide & show nexus between the advancing of funds and his business interest. The test is whether a *reasonable person stepping into the shoes of the assessee and working solely in the interest of the assessee would have extended such interest free advances*. However, the legal effect of the transaction cannot be

displaced by probing into the “substance of the transaction”.

[Source: *CIT vs. Rockman Cycle Industries (Punjab & Haryana High Court – Larger Bench)* ITA Nos. 169 and 170 of 1996]

➤ Notification

New Form 13

Vide Notification No. 16/2011/F.No. 133/11/2011-SO(TPL) dated 29th March, 2011 for the purpose of Application by a person for a

certificate under sections 197 and/or 206C(9) of the Income-tax Act, 1961, for no deduction/collection of tax or deduction/ collection of tax at

a lower rate has to be made in new Form 13.

[Source: Notification No. 16/2011/F.No. 133/11/2011-SO(TPL) dated 29th March, 2011]



INDIRECT TAX

Central Excise & Custom

➤ Case Laws

Confiscated Goods

Sale of Confiscated goods without notice- Strictures against Department-Tribunal order directing release of confiscated goods-Department stating that goods sold due to communication gap between officers-Goods sold by Revenue without giving notice to owner and without conducting public auction-Sale made in total disregard of Section 150 of Customs Act, 1962-Action of Revenue in utter disregard of C.B.E. & C. Circular No. 711/4/2006-Cus. (AS), dated 14-2-2006-Impugned action of sale of goods not sustainable-Revenue directed to pay sale amount with interest @ 9% from date of order of Tribunal till date of actual payment.

[Source: Rang BirajgiSarees (P) Ltd. V. Additional Commissioner of Customs, 2011 (265) E.L.T. 26(Cal.)]

MRP Based Valuation of Tubes

Valuation (Central Excise)-MRP based valuation-Inner tubes of tyres to inflate them-Tubes cleared only to automobile manufacturers-Tubes parts, components and assemblies of automobiles', classifiable under Chapter 87 of Central Excise Tariff, enlisted at entry 97 of Notification No. 9/2010-C.E.(N.T.)- Valuation of tubes based on MRP upheld -CBEC Instruction F. No. 167/38/2008-CX.4, dated 16-12-2008 found to be applicable- Notification No. 9/2010 C.E.(N.T.) stating to exclude vehicle under specific headings found to have only prospective effect, and inapplicable- Section 4A of Central Excise Act, 1944.

[Source: Pelican Rubber Ltd. v Commissioner of C. Ex., Hyderabad, 2011 (265) E.L.T. 33(Tri.- Bang.)]

Appeal to Appellate Tribunal-Absence of COD clearances-Delay in approaching committee for necessary clearances- Evident from appeals that though Revenue's Claim involves crores of

rupees, no efforts made since November 2006 to obtain COD clearance- Fact essential to be brought into notice of Finance Minister, Revenue Secretary and Chairman of Board-Registrar of CESTAT directed to forward copy of order-Appeal adjourned for securing necessary COD- Section 35B of Central Excise Act, 1944.

[Source: Commissioner of C. Ex., Bangalore v Hindutatan Petroleum Corpn. Ltd. 2011 (265) E.L.T. 42(Tri.- Bang.)]

Import-Export Code (IEC)

Confiscation- Absence of Import-Export Code (IEC)- Confiscation of goods alleging that Martin real importer and having no IE code, section 7 of Foreign Trade (Development and Regulation) Act, 1992 violated- Alexander possessing valid IE code filed Bill of Entry of goods in question- Martin not held himself as owner of goods- No reason not to treat Shine enterprises (Proprietor Sh. Alexander) as importer-Confiscation not warranted-Section 111 of Customs Act, 1962.

[Source: F. Alexander v Commissioner of Customs,

Chennai, 2011 (265) E.L.T. 42(Tri.-Bang.)]

Documents for availing credit

Cenvat/Modvat- Documents for availing credit- credit denied as assessee produced photocopies of original invoices- Receipt of goods in factory and use thereof confirmed by officer's report- Assessee's stand for non-production of original documents due to its loss not controverted- Photocopy of original invoice showing goods have discharged duty- Cumulative circumstances led to conclusion that credit to be extended as assessee's claim that inputs to long gap to verify transporter's copy in original not to lead to denial of substantive benefit of credit to assessee- Impugned order upheld- Rule 9 of Cenvat Credit Rules, 2004.

[Source: Commissioner of Central Excise, Salem v JSW Steels Ltd., 2011 (265) E.L.T. 50(Tri.-Chennai)]

Denial of SSI Exemption

SSI Exemption- Brand name, use of brand name of another- proof- Alleged denial of manufacture of goods for period subsequent to 2001-02- according to reply to show cause notice dispute relating to fact of supply and not

manufacture of branded goods- Paras 5 and 6 of reply showing mere denial of fact of supply, nowhere disclosing denial of fact of manufacture- Clear admission of manufacture of goods for period 2001-02 and no denial of said fact for subsequent period- Also adjudication authority's recording disclosing supply of goods to M/s Omega Appliances during 2001-02 and assessee's request for adoption of a lenient view- Proprietor's statement accepting duty liability of goods sold to M/s Omega Appliances during last 3 years never retracted- Assessee's contention that Department failed to establish manufacture during relevant period unacceptable- Clear admission of manufacture- No infirmity in impugned order denying SSI exemption- Notification No. 8/2001-C.E.

[Source: Yong Man Engineers v Commissioner of E. Ex., Pnachkula, 2011 (265) E.L.T. 51(Tri.- Del.)]

➤ Service Tax

Adjustment of excess tax paid

Demand- Service Tax paid in excess in October 2007 adjusted against Service tax

payable for January 2008 and February 2008- Revenue contending that intimation about adjustment not given within 15 days to jurisdictional Superintendent- Delay in intimation only technical fault and no short payment of tax- Intimation given by respondent not considered while issuing SCN- Impugned order holding Service Tax correctly paid by adjustment, sustainable- Rule 6 of Service Tax Rules, 1994.

[Source: Commissioner of C. Ex., Aurangabad v RajdeepBuildcon Pvt. Ltd., 2011 (21) STR 663 (Tri-Mumbai)]

Exemption of refund- Export of Goods

Refund of service tax on services used in export of goods under Notification No. 41/2007-ST- Exemption/refund denied on the ground that appellant not registered under Business Auxiliary Services- C.B.E. & C. Circular dated 12-3-2009 and Tribunal decision in 2010(17) S.T.R. 262 applicable and held even if the service provided is registered for providing one service refund cannot be denied on the ground that the taxable service provided are not covered under the registration.

[Source: Cbay Systems (India) Pvt. Ltd. v Commissioner of C. Ex.,

Mumbai., 2011 (21) STR 668 (Tri-Mumbai)]

Limitation for Refund

Stock Broker Service-Brokerage with Service Tax refunded by applicant but refund claim filed beyond one year- Refund made based on reaching specified turnover over a period- Not possible to file refund claim in time in such a system but appellant failed to utilize provisional assessment facility- Service tax could be correctly determined only after specified period when turnover known-Refund for one month could be in time but details not provided-impugned order rejecting refund, sustainable- Section 11B of Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994.

[Source: Nyalchand Financial Services Ltd. v Commissioner of S.T., Ahmedabad, 2011(21) STR 669 (Tri- Ahmd.)]

Cenvat Credit of Service Tax paid by Job work

Relying on the decision in case of SPIC (HCD) Ltd. [2006 (201) E.L.T. 386 (Tribunal)] the Tribunal held that the

assessee is entitled to take Cenvat Credit of the duty paid by the job worker even though the latter is not required to pay such duty. Rule 4 of Cenvat Credit Rules, 2004.

[Source: Multi Organics Pvt. Ltd. v Commissioner of C. EX., Nagpur, 2011(21) STR 695 (Tri- Mumbai)]

Refund of Service tax on Transportation

Export of goods- Refund of Service Tax on services used in export of goods- Service tax paid on transport of empty containers from yard to factory for stuffing export goods eligible for refund- Section 93 of Finance Act, 1994.

[Source: Commissioner of C. Ex., Madurai v Tata Coffee Ltd, 2011(21) STR 695 (Tri- Chennai)]

No Service Tax on Cashless Health Insurance

There will be no service tax on cashless health insurance transactions, reports CNBC-TV18 quoting sources from Central Board of Excise and Customs (CBEC). It is learnt that the changes will notified by the board soon.

The Finance Minister PranabMukherjee in Budget 2011-12 had proposed levying 5% tax on all services provided by private hospitals having at least 25 beds with central air-conditioning facility and also on all diagnostic tests.

However facing severe criticism, the FM has already exempted healthcare from service tax. Service tax on healthcare was first announced last year, but it was only on bills settled by insurance companies.

[Source- CNBC-TV18, dated 22nd March,2011]

➤ Notifications/Circulars

Point of Taxation Rules, 2011

Point of Taxation Rules, 2011 has been promulgated w.e.f. from 1st April, 2011. The provision of this rule prescribe for the time when an assessee is required to pay Service tax.

[Source: Notification No. 18/2011-ST (amended by Notification No. 25/2011-ST)]

COMPANY LAW UPDATES

➤ Circulars

Filing of Balance Sheet and profit and Loss Account in eXtensible Business Reporting Language (XBRL) mode

It has been decided by the Ministry of Corporate Affairs to mandate certain class of companies:

- (i) All companies listed in India and their subsidiaries, including overseas subsidiaries;
- (ii) All companies having a paid up capital of Rs. 5 Crore and above or a Turnover of Rs 100 crore or above.

to file balance sheets and profit and loss account for the year 2010-11 onwards by using XBRL taxonomy. The Financial Statements required to be filed in XBRL format would be based upon the Taxonomy on XBRL developed for the existing Schedule VI, as per the existing, (non converged) Accounting Standards notified under the Companies

(Accounting Standards) Rules, 2006.

[Source: MCA General Circular No: 9/2011 dated 31st March, 2011]

Prosecution of Directors

The said Circular set out guidelines and parameters to the Registrar of Companies regarding prosecution of directors. The guidelines issued herein above should be applied and wrongful prosecution should be avoided. Wherever the Registrar of Companies has doubt as to whether director/officer can be held liable after applying the above parameters, they should refer to Regional Director, who shall guide Registrar of Companies in the matter.

All cases which are pending against Directors of companies above must be relooked at, based on these parameters and a report must be sent by each Regional Director with specific recommendation in case the proceedings are proposed to be discontinued.

[Source: MCA General Circular No: 8/2011 dated 25th March, 2011]

Payment of MCA fees – electronic mode

In the interest of stakeholders, with a view to improving service delivery time, Ministry has decided to accept payments of value upto Rs.50,000, for MCA 21 services, only in electronic mode w.e.f 27th March, 2011.

For the payments of value above Rs. 50,000, stakeholders would have the option to either make the payment in electronic mode, or paper challan. However such payments would also be made in electronic mode w.e.f .1st October'2011.

[Source: No. HQ/9/2002-Computerization Government of India Ministry of Corporate Affairs dated 9th March, 2011]

Process of incorporation of Companies (Form-1) and establishment of

principal place of business in India by Foreign Companies (Form-44) –Procedure simplified.

The Ministry has got the issue examined by Business Process Re-engineering Group under MCA-21 and in order to speed up and simplify the process of incorporation of Companies and establishment of principal place of business in India by Foreign Companies for reduction in time taken by Registrar of Companies, the below mentioned procedure have been recommended :

1. Only Form-1 shall be approved by the RoC Office. Form 18 and 32 shall be processed by the system online.
2. There shall be one more category, i.e., Incorporation Forms (Form 1A, Form 37, 39, 44 and 68) which will have the highest priority for approval.
3. Average time taken for incorporation of company should be reduced to one (1) day only.
4. A Notification to notify minor changes in e-forms 18 and 32 to enable them to

be taken on record through STP mode for aforesaid procedure is being issued separately

[Source: MCA General Circular No: 6/2011 dated 8th March, 2011]

Payment of Commission to Non-Whole Time Directors of the Company under Section 309(4)(b) of the Companies Act, 1956

It has now been decided that a company shall not require approval of the Central Government for making payment of remuneration by way of the commission to its Non- Whole Time Director(s) in addition to the sitting fee if the total commission to be paid all those Non- Whole Time Directors does not exceed 1 % of the net profit of the company if does not have a Managing Director or Whole Time Director(s).

[Source: MCA General Circular No: 4 /2011 dated 4th March, 2011]

Simplification of DIN rules

In order to speed up and simplify the process to obtain a DIN on **the same day**, it was recommended to simplify the

existing Companies (Directors Identification Number) Rules, 2006. Penal action against the applicant and professional certifying the DIN application in case of false information / certification as per provisions of section 628 of the Act will be taken in addition to action for professional misconduct and revocation of DIN, allotted on false information.

[Source: MCA General Circular No: 5/2011 dated 4th March, 2011]

Revised Schedule VI (shall be effective from 01.04.2011)

The Central Government has replaced the existing Schedule- VI to the Companies Act, 1956 **effective from 01.04.2011.**

[Source: MCA Notification 447(E) dated 28th February, 2011]

Clarification in respect of Circular No. 2/2011 dated 8th February, 2011 regarding direction under Section 212(8) of the Companies Act, 1956

It is clarified that this Ministry Circular No. 2/2011 dated 8th February, 2011 shall be

effective in respect of balance sheet and profit and loss accounts prepared regarding the financial year ending on or after the 31st March, 2011.

[Source: MCA General Circular No: 3 /2011 dated 21st February, 2011]

Direction under Section 212(8) of the Companies Act, 1956

The Central Government hereby directs that provisions of Section 212 shall not apply in relation to subsidiaries of those companies which fulfill

the conditions as specified in the said Circular.

[Source: MCA General Circular No: 2 /2011 dated 8th February, 2011]

➤ Notifications

Amendment in Form-61-Companies (Central Government's) General Rules and Forms, 1956 (Amendment) Rules, 2011

The following changes are made in serial number 6 and entries relating thereto of Form -61 w.e.f. 26th March, 2011:

“Application filed for-

1. Compounding of offences
2. Extension of period of annual general meeting by

three months under section 166(1)

3. Extending the period of annual accounts upto eighteen months under section 210(4)
4. Declaring a defunct company under section 560
5. Scheme of arrangement, amalgamation
6. Normalising a dormant Company
7. Others”.

[Source: MCA Notification no. GSR (E) dated 26th March, 2011]

Notification Revising DIN-1 and DIN-4 form and requirement of Undertaking – Companies (Director Identification Number) Amendment Rules, 2011

As per Companies (Director Identification Number) Amendment Rules, 2011 the procedure for allotment of DIN has been revised.

[Source: MCA Notification no. GSR (E) dated 26th March, 2011]

Delegation of powers and functions to Registrar of Companies on selective provisions

The Central Government hereby delegates to the Registrar of Companies, the powers and functions of the Central Government under the following provisions of the said Act, namely:-

- Section 21- Change of name
- Section 25-Power to dispense with “ Limited” in name of charitable or other company
- Proviso to Sub Section (1) of Section 31- Alteration of articles to the effect of conversion of public company into private company
- Sub-section (1D) of Section 108- Power of Central Government to direct companies not to give effect transfer.
- Section 572- change of name for the purpose of registration under Part IX

[Source: MCA Notification no. GSR 222 (E) dated 17th March, 2011]

Delegation of powers and functions to Regional Directors on selective provisions

The Central Government hereby delegates to the Regional Directors at Mumbai, Kolkata, Chennai, Noida and Ahmadabad, the powers and functions of the Central Government under the following provisions of the said Act, namely:-

- Section 22- Rectification of the name of the Company ,
- Sub-sections (3),(4),(7) and clause (a) of sub-section (8) of section 224- appointment and remuneration of auditors,
- Section 297 (1) Proviso-board’s sanction to be required for certain contracts in which particulars directors are interested,
- Section 394-A- Notice to be given to Central Government for applications under section 391 and 394,
- Section 400-Notice to be given to Central Government of the applications under section 397 and 398,

- Second proviso to sub-section (5) of section 439 and sub-section (6) of the said section- Provisions as to applicable for winding up,
- Clause (a) of sub-section (1) of section 496- Duty of liquidator to call general meeting at end of each year,
- Clause (a) sub-section (1) of section 508- Duty to liquidator to call meetings of company and of creditors at end of each year,
- Sub-section (1) of section 551-Information as to pending liquidations,
- Clause (b) of sub-section (7) of section 555 and the proviso to clause (a) of sub-section (9) of the said section-Unpaid dividends and undistributed assets to be paid into the Companies Liquidation Account ,
- Provisos to sub-section (1) of section 610- Inspection,production and evidence of documents kept by Registrar and
- Section 627- Production and inspection of the books where offence suspected.

This notification shall come into force on the date of its

publication in the Official Gazette.

[Source: MCA Notification no. GSR 223(E) dated 17th March, 2011]

Revision in Form-2-Companies (Central Government's) General Rules and Forms, 1956 (Amendment) Rules, 2011

The following changes are made in serial number 6 and

entries relating thereto of Form -61 w.e.f. 26th March, 2011:

“Application filed for-

1. Compounding of offences
2. Extension of period of annual general meeting by three months under section 166(1)
3. Extending the period of annual accounts upto eighteen months under section 210(4)

4. Declaring a defunct company under section 560

5. Scheme of arrangement, amalgamation
6. Normalising a dormant Company
7. Others”.

[Source: MCA Notification no. GSR 78 (E) dated 10th February, 2011]



RBI UPDATES AND FEMA UPDATES

➤ Latest Notification/ News

Non-Banking Financial (Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2007 – Insertion of new paragraph 19A

After paragraph 19 of the said Directions, the following paragraph 19A shall be inserted.

“NBFCs not to be partners in partnership firms”

19A. (1) No non-banking financial company, which is accepting public deposit shall contribute to the capital of a partnership firm or become a partner of such firm.

(2) A non-banking financial company, which is accepting public deposit and which had already contributed to the capital of a

partnership firm or was a partner of a partnership shall seek early retirement from the partnership firm.

[Source: Notification no. DNBS.227/CGM(US)-2011, 30-3-2011]

Introduction of Annual return on Foreign Liabilities and Assets reporting by Indian Companies and discontinuation of the Part B of form FC- GPR

Attention of the Authorised Dealer Category – I (AD Category – I) banks is invited to A. P. (DIR Series) Circular No.40 dated April 20, 2007 wherein, it was, inter-alia, stipulated that Part B, which is an annual return of all investments made in the company during a financial year, is required to be submitted directly by the

Company to the Director, Balance of Payment Statistics Division, Department of Statistics and Information Management, Reserve Bank of India, C-9, 8th floor, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051, by June 30th of every year.

In order to capture the statistics relating to Foreign Direct Investment (FDI), both inward and outward in a more comprehensive manner as also to align it with international best practices, it has been decided to replace Part B of the Form FC-GPR by a separate ‘Annual Return on Foreign Liabilities and Assets’ given as [Annex-I](#). The return should be submitted by July 15 of every year to the Director, Balance of Payment Statistics Division, Department of Statistics and Information Management (DSIM), Reserve Bank of India, C-9, 8th floor, Bandra Kurla Complex, Bandra

(E), Mumbai – 400 051. Further, the return should be submitted by all the Indian companies which have received FDI and/or made FDI abroad (i.e. overseas investment) in the previous year(s) including the current year. The [Annex – II](#) gives the concepts and definitions useful in filling the Annual Return on Foreign Liabilities and Assets.

These directions will come into force with immediate effect. AD Category-I banks

may bring the contents of this circular to the notice of their constituents and customers concerned.

Necessary amendments to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 and the Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004 notified vide Notification No. FEMA 20/2000-RB dated

May 3, 2000 and Notification No. FEMA 120 dated July 07, 2004, respectively will be issued separately.

The directions contained in this circular have been issued under sections 10(4) and 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and is without prejudice to permissions / approvals, if any, required under any other law.

[Source: RBI/2010-11/427, A.P. (DIR Series) Circular No. 45, March 15, 2011]



CORPORATE FINANCE

➤ Latest News

PRIVATE EQUITY

Facebook valued at \$65 billion in new investment

Investment firm General Atlantic is investing in Facebook, valuing the leading social network at \$65 billion, representing a 30 percent boost from its last big investment in January.

General Atlantic is purchasing a block of roughly 2.5 million Facebook shares from former Facebook employees, giving the firm a 0.1 percent stake in the company.

[Source: Reuters March 04, 2011]

Stanchart PE invests Rs 85cr in Privi Organics

Standard Chartered Private Equity has invested Rs 85 crore in Privi Organics, a Mumbai-based manufacturer, supplier and exporter of aroma chemicals. The

company will use the funds to expand its manufacturing facilities at Mahad, Maharashtra and also support key backward integration projects.

[Source: The Economic Times, March 09, 2011]

Nippon life picks 26% in Reliance life for \$680m

Japan's Nippon Life Insurance, the world's sixth largest insurer, has acquired 26% in Reliance Life Insurance, an Anil Ambani Group Company, for Rs 3,062 crore (\$680 million). This transaction pegs the total valuation of Reliance Life Insurance at approximately Rs 11,500 crore (\$2.6 billion) and is touted as the biggest FDI inflow in the Indian insurance space.

With this strategic investment, Nippon Life will bring to Reliance Life its expertise in product development, underwriting, investment management, distribution, customer relationship and risk management.

[Source: Vccircle.com, March 15, 2011]

Tata steel raises \$332m in first ever perpetual bond issue

Tata Steel has completed a planned fund raising initiative scooping up Rs 1,500 crore (\$332 million) through a perpetual bond issue, making it the first-ever company to issue such hybrid corporate bonds in the country.

The securities are perpetual in nature with no maturity or redemption and are callable only at the option of the firm. The distribution rate has been pegged at 11.8% per annum with a step up provision if the securities are not called after ten years. J.P. Morgan Securities India Pvt Ltd and ICICI Bank Ltd were the lead arrangers for the securities that rank senior to only share capital of the firm, making it a hybrid instrument.

[Source: Business Standard, March 18, 2011]

Venture Capital

BMW venture arm invests \$5m NRI-backed mobile app firm

Auto maker BMW's venture fund BMW i Ventures has invested \$5 million in MyCityWay, a New York based company offering a location-aware app for mobiles. This startup was founded in 2009 by three NRIs - Archana Patchirajan, Sonpreet Bhatia and Puneet Mehta. The stake acquired by BMW is not known.

[Source: The Economic Times, March 04, 2011]

Myntra raises \$14m from Tiger Global; to follow broad E-com strategy

E-commerce firm Myntra.com has raised \$14 million in its second round of funding led by Tiger Global and participated by existing investors IDG Ventures and Indo-US Venture Partners.

A nominee from Tiger Global will be joining the board of directors of the company. The funds will be used to invest in areas such as technology,

logistics, supply chain and marketing - and is expected to last for two years.

[Source: The Economic Times, March 14, 2011]

Bankbazaar.com raises \$6m in series A from Walden International

BankBazaar.com, online loan information and processing website, has raised \$6 million in its first venture capital round from global fund Walden International.

The company will use the funds to hire more financial services and technology experts.

[Source: Vccircle.com, March 18, 2011]

Mayfield and Nexus put Rs35.5cr in Sohanlalcommodity management

Mayfield India and Nexus Venture Partners have invested Rs 35.5 crore in Sohanlal Commodity Management Pvt. Ltd. (SLCM), a leading company focused on providing post-harvest agricultural solutions. The company had earlier

raised Rs.10 crore from Nexus Venture Partners.

SLCM will use the money to expand its business, invest in IT and add further warehousing capacity. The quantity of stake sale is not known.

[Source: Business Standard, March 27, 2011]

Games2win raises \$6 million to ramp upcontent, operations

Games2win, an online gaming company, has raised \$6 million in Series B financing from Clearstone Venture Partners and Silicon Valley Bank (SVB India Capital Partners). While the amount of the stake sold is not known, the promoter group continues to own one-third stake in the company.

[Source: The Economic Times, March 29, 2011]

Investment Banking

Reliance Industries to enter financial services in JV with DE Shaw

Reliance Industries Ltd, controlled by billionaire Mukesh Ambani, agreed to set up a joint venture with the

D.E. Shaw Group to build a financial services company. No financial terms were available.

The JV aims to offer an array of financial services to the Indian market.

Mukesh Ambani made a dramatic return to telecoms last year with the \$1 billion acquisition of Infotel Broadband, the only company to win a nationwide license for broadband wireless

spectrum in an Indian government auction.

[Source: Reuters, March 28, 2011]



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