

RNM ALERT

Thinking of the Bottom Line – Think of Us

ISSUE NO.33
AUGUST, 2011

www.rnm.in



U.N. Marwah

Dear Readers,

I am sure that all of you would be busy in last minute preparations for the Annual General Meetings for approval of accounts and the unlucky few would still be in the process of hurriedly completing the Tax Return filings.

The Ministry of Company Affairs has come out with a new settlement scheme for defaulters as per which only 25% of late fee is to be paid.

The RBI has issued draft guidelines for public comment on issuing Banking Licenses to the private sector. These guidelines were much awaited and leading business houses, NBFCs and Brokerage firms are making a beeline to structure their affairs in a manner to be eligible for the License.

India's economy grew 7.7% in the three months from April to June of 2011, compared with the same period of 2010. It was India's weakest growth for six quarters, but still better than had been expected. Inflation in July was 9.22%, which was well above the RBI's target rate of 4% to 4.5%. The RBI is expected to announce another 25 bps rate hike shortly to try and stem the inflation growth. This is on the back of poor foreign exchange rates, with the Rupee sliding further. The Indian central bank sold dollars for the first time since Lehman Brothers triggered credit crisis to avert disorderly movement in the currency as it fell to its worst levels in two years.

Interesting avenues for raising External Commercial Borrowings (ECBs) remain for Corporate India, albeit by taking hedged positions, due to interest arbitrage between India and global markets. A 4-5 % interest rate savings can be obtained under the ECB route. Our professional Corporate Finance team can be contacted for further details.

The month of August was filled with many long weekends and holidays and I hope most of you were able to catch up on some quality leisure time.

Regards,

U.N. Marwah

For and behalf of the RNM Alert Editorial Board

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DIRECT TAX

➤ Case Laws

Deemed Dividend

Sec 2(22)(e): Deemed dividend- security deposit-Date of deposit

Since on the date on which the security deposit was given by the company to the assessee, the assessee held less than 10 percent beneficial interest in company, the amount of security deposit can not be treated as deemed dividend under section 2(22)(e), merely on the ground that share holding increased to 44% of issue of shares by the company in lieu of security deposit. (A.Y. 1998-99).

[Source: CIT v Late C.R. Das (2011) 57 DTR 201 (Delhi) (High Court)]

Basis of Charge & Scope of Total Income

Sec 4: Interest Income earned – Performance guarantee

Interest income earned by the assessee on the fixed deposit for performance guarantee of contract was held to be capital in nature and cannot be assessed as income from other sources.

[Source: CIT vs. Jaypee DSC Ventures Ltd. (2011) 53 DTR 305 (Del) (High Court)]

International Taxation

Sec 9(i): Income deemed to accrue or arise in India – India US DTAA

On facts, Liaison office purchasing diamonds for export to HO does not constitute PE under India-US DTAA and it was covered under explanation 1(b) to section 9(1)(i) of Income Tax Act.

[Source: ADIT vs. M. Fabrikant & Sons Ltd., dt.28-01-2011, A.Y. 1999–2000 to 2002-03 & 2003 – 2004, BCAJ pg. 42, Vol. 43-A, Part 2, May 2011]

Sec 9(1)(vii): Income deemed to accrue or arise in India- Fees for technical services

Income received by a US company, by way of fees for technical services could not be deemed to have accrued or arisen in India as the services under the agreement were not rendered within India even though services received from it may have been utilized by the Indian company in India. (Asst year 1991-92).

[Source: Grasim Industries Ltd & Ors v CIT (2001) 58 DTR 47/242 CTR 166(Bom) (High Court).]

Sec 9(1)(vii): Income deemed to accrue or arise in India- Deduction of tax at source- Payment to non resident- Training its personnel-Fees for technical service- Income deemed to accrue or arise in India (S. 40(a)(i), 195)

Assessee company during relevant assessment year made payment to non resident party for training its personnel or customers to explain proposed buyers salient features of products imported by assessee in India and to impart training to customers to use equipment. The payment made could not be said to be fees for technical services and not liable for deduction of tax at source. (Asst Year 2007-08).

[Source: Asst CIT v PCI Ltd (2011) 46 SOT 183 (Delhi) (Trib)]

Sec 9: Income deemed to accrue or arise in India- liaison office.

Liaison office of a South Korean company carrying on activities of identifying the buyers, negotiating with them, procuring purchase orders, forwarding the same to head office in Korea, following up with the customer for realization of payments and offering after sales services was held to be a Permanent Establishment (P.E.) and the profits earned in India through this liaison office are taxable in India as per Article 5 of the DTAA between India and South Korea (A. Y. 2001-02 to 2006-07)

[Source: *Jebon Corporation India Liaison Officer vs. CIT (Int. Taxation) & Anr. (2011) 55 DTR 113 (Kar)(High Court)*]

Charitable or Religious Trust

Sec 11: Charitable trust- Property sub let

In order to carry out the charitable activity of the trust in effective manner if the property of the trust is sub – let and rental income is received thereon the exemption under section 11 cannot be denied by the assessing officer invoking provisions of section 11 (4A) of the Act. (A.Y. 1991-92).

[Source: *Director of Income tax (Exemption) vs. Sahu Jain Trust (2011) 56 DTR 402 (Cal) (High Court)*]

Disallowance of Interest u/s 14A

Sec 14A: No disallowance under section 14A of interest on borrowed funds if AO does not show nexus between borrowed funds & tax-free investment

In AY 2000-01 the assessee had investments in shares & mutual funds of Rs. 20 crores on which it earned tax-free dividend of Rs. 13.35 lakhs. The assessee also had borrowed funds on which it claimed deduction of interest of Rs. 8.70 crores. The AO disallowed interest of Rs.2.79 crores on the ground that it was relatable to earning tax-free dividend. The Tribunal deleted the disallowance on the ground that the investments had been made out of the assessee's own funds and not out of the borrowed funds. The High Court HELD **in the absence of any material or basis to hold that the interest expenditure directly or indirectly was attributable for earning the dividend income**, the decision of the Tribunal in deleting the disallowance of interest made u/s 14A cannot be faulted.

[Source: *CIT vs. K. Raheja Corporation Pvt Ltd (Bombay High Court)*]

House Property

Sec 22: Income from House property- Business income- Business of construction and development of residential –Commercial unit [(S. 28(i))]

In case where assessee who is engaged in construction and development of residential/ commercial units and where there was no material on record to show that leasing of residential/ commercial units was one of the principal objects of the company and that lease rent received by it was from exploitation of property by way of complex activities, the rent income derived as owner of property will be assessed as 'Income from House Property'.

[Source: *Roma Builders (P) Ltd v JCIT (2011) 131 ITD 91 (Mumbai) (Trib)*]

Sec 24: Income from house property- Deduction-Interest on Loans raised for repayment of original loan- Maintenance charges- Lift- Lighting Sweeping Charges (S. 22, 23)

Loan raised for repayment of original loan taken to purchase house property partakes the character of original loan and therefore interest paid on such subsequent loan is deductible under section 24 from the rental income of property. Charges paid to the society for the facilities of generator, lift, lighting etc were deductible from the gross rent received by the assessee. (Asst Year 2004-05).

[Source: CIT v Sunil Kumar Agrawal (2011) 139 TTJ 49 (Luck) (UO) (Trib)]

Profit & Gain from Business & Profession

Sec 32: Depreciation – User of asset –Kept ready for production

Where the plant and machinery were kept ready for production, the assessee would be entitled to claim depreciation under the provisions of Section 32 of the Act even though such plant and machinery were not actually put to use by the assessee during the year. (A.Y. 1995-96)

[Source: CIT vs. Shahbad Co – operative Sugar Mill Ltd. (2011) 56 DTR 414 (P&H)(High Court)]

Sec 37(1): Business expenditure- Keyman insurance premium (S. 10 (10D))

Assessee is a Chartered Accountant had debited an amount of Rs 50 Lakhs towards Keyman Insurance Premium, which was taken in one of the employee who was the head of the financial consultancy division and looking after the financial consultancy for corporate finance. The appeal of the assessee was allowed by the Tribunal. On appeal by the revenue the Court held that it is the prerogative of the businessman to consider and decide as to which of the employees is important for the business and it is for him to take life insurance policy for such an employee keeping in mind various factors and circumstances. The High Court confirmed the order of Tribunal.

[Source: CIT v Kamlesh M. Solanki – Tax appeal no 2421 of 2009 dt 26-4-2011 (ACAJ Vol 35 part 03 June 2011 P. 165 (Guj) (High Court)]

Sec 37(1): Business Expenditure- Parties found non-existent after three years-Expenditure cannot be disallowed

Where the assessee took care to purchase materials for his business by way of account payee cheque from third party and subsequently the parties do not appear before the assessing authorities as they had discontinued their business, the assessee's claim of genuine business expenditure cannot be disallowed for their non existence after three years of transactions. (A. Y. 1998-99)

[Source: Diagnostics vs. CIT (2011) 56 DTR 317 (Cal) (High Court)]

Capital Gain

Sec 50: Capital gains – Depreciable asset - Long term

Capital gains arising on transfer of a capital asset (Flat) on which depreciation was allowed for two years but thereafter the assessee stopped claiming depreciation and also gave the flat on rent is chargeable as long term capital gains after allowing the benefit of indexation.

[Source: Prabodh Investment & Trading Company Pvt. Ltd., ITA No. 6557/Mum/2008, dt.28-02- 2011, A.Y. 2004 – 2005, 'C' Bench, Mumbai ITAT, BCAJ pg. 24, Vol. 43-A, Part 1, April 2011]

Sec 50: Capita gains- Capital loss- Set off of brought forward long term capital loss (S.74)

Prescriptions of section 50 are to be extended only up to the stage of computation of capital gains and therefore, capital gain resulting from transfer of depreciable assets which were held for a period of more than three years would retain the character of long term capital gain for all other provisions and consequently qualify for set off against brought forward loss from long term capital assets. (Asst Year 2005-06).

[Source: *Manali Investments v Asst CIT (2011) 139 TTJ 411 (Mumbai) (Trib)*]

Undisclosed Income

Sec 69: Undisclosed investment- Search and seizure- Jewellery- CBDT Circular

The court held that the CBDT circular had been issued for the purpose of non seizure on the basis of recognized customs prevailing in Hindu Society, and unless the revenue showed anything to the contrary, it could safely be presumed that source to the extent as stated in Circular no 1916 stands explained, accordingly the order of Tribunal deleting the addition was confirmed.

[Source: *CIT v Ratanlal Vyaparilal Jain (2011) 199 Taxman 90 (Guj) (Mag) (High Court)*]

Deduction u/s 80IB

Sec 80IB: Deduction-Profits and gains derived from industrial undertakings- Sale of scrap- Manufacture- Labour charges

Activity of forging which involves heat treatment of material to produce automobile parts is “manufacture” and therefore, labour charges and job work charges earned by the assessee for doing the job of forging for customers are gains derived from industrial undertakings and the same are entitled for deduction under section 80IB. Sale of scrap which is generated in the process of manufacturing activity and proximate there to constitute gains derived from Industrial undertaking for the purpose of computing deduction under section 80IB. (A. Y. 2004-05)

[Source: *CIT v Sadhu Forgings Ltd (2011) 57 DTR 194/242 CTR 158 (Delhi) (High Court)*]

Assessment Procedure

Sec 143(2): Assessment- Notice

Where notice u/s. 143(2) was served upon the assessee after a period of 12 months from the end of the month in which the return was filed, it was held that the proceedings in pursuance of such notice was invalid and liable to be quashed.

[Source: *DCIT V/s. Maxima Systems Ltd. {2011} 198 Taxman 192 (Guj.) Mag.)(High Court)*]

Sec 143(3): Assessment- Additions

Where the assessee himself offered Rs. 20 Lacs as income purportedly on account of deficit in stocks but apart from the assessee’s offer, there was no other material pointing towards such deficit, it was held that addition was not justified.

[Source: *CIT V/s. C. Jayantilal {2011} 199 Taxman 34 (Mad.) (Mag.)(High Court)*]

Sec 147: Reassessment-Exempted income-Despite bar in Proviso to s.14A, s.147 reopening for earlier years valid (S. 14A)

S.14A was inserted subsequently by FA 2001 (w.r.e.f 1.4.62) and was tabled in Parliament on 28.2.2001, the assessee did not make any disallowance u/s 14A. The AO also did not make a disallowance in the s. 143 (3) order passed on 7.3.2003. After the expiry of 4 years, the AO sought to reopen the assessment to make a disallowance u/s 14A. The assessee challenged the reopening on the ground that (i) under the Proviso to s. 14A, a reopening u/s 147 for AY 2001-02 & earlier years was not permissible, (ii) as s. 14A was not on the statute when the ROI was filed, there was no failure to disclose & (iii) as the AO had also sought to rectify u/s 154, he could not reopen u/s 147. The High Court (197 TM 415) dismissed the Writ Petition inter alia on the ground that “the Proviso to s. 14A bars reassessment but not original assessment on the basis of the retrospective amendment. Though the ROI was filed before s. 14A was enacted, the assessment order was passed subsequently. The AO ought to have applied s. 14A and his failure has resulted in escapement of income. The object and purpose of the Proviso is to ensure that the retrospective amendment is not made as a tool to reopen past cases which have attained finality“. The Supreme Court dismissed the Appeal.

[Source: **Honda Siel Power Products Ltd vs DCIT (SC)** www.itatonline.org]

Sec 147: Reassessment: After four years- Internal auditor

Notice issued after expiry of four years from the end of the relevant assessment year merely based on the report of the internal auditors was held to be bad in law when all the particulars were duly disclosed by the Appellant during the original assessment proceedings under section 143 (3) of the Act.(1997-98)

[Source: **CIT vs. Simbhaoli Sugar Mills Ltd. (2011) 55 DTR 233 (Del)(High Court)**]

Sec 147: Reassessment – Merger-Deduction- With in four years (S.80HHC, 80I, 80IA)

Where the assessing officer after due application of his mind allowed the assessee’s claim of deduction under section 80 HHC, 80 I and 80 IA of the Act after some modification, for which assessee preferred an appeal before the appellate authority. Reopening the assessment within four (4) years on the ground that deduction under section 80 HHC, 80 I and 80 IB of the Act was excessive was held to be bad in law for the reason that the assessment order has merged with the order of the CIT (A) and had no independent existence. (1996-97)

[Source: **United Phosphorus Ltd. vs. Addl. CIT (2011) 56 DTR 193 (Guj)(High Court)**]

Sec 147: Reassessment- Block assessment

Block assessment framed under chapter XIV – B of the Act can be reopened under section 147 of the Act. (A. Y. 1995-96)

[Source: **CIT & Anr. vs. Rinku Chakraborty (2011) 56 DTR 227/ 242 CTR 425 (Kar)**]

Sec 147: Reassessment-Reason to believe-Development agreement-Capital gains (S. 148)

Assessee entered in to development agreement on 17-9-2004, on a consideration of Rs 4 crores. As the developer failed to pay the agreed consideration, of Rs 30 lakhs before 31-10-2004, the assessee terminated the agreement. Thereafter issuing the cheques for Rs 30 lakhs on 30-6-2005, the development

agreement was restored. In view of further default on the part of developer, on 19-5-2010, the development agreement was once again terminated. The developer has filed the suit before Bombay High Court, which was ultimately settled on 2-5-2011, where in the consideration was enhanced from 4 crore to 7.5 crores. It was ordered the possession of the property to the developer on 2-5-2011. In the mean while the Assessing Officer issued notice under section 148 dated 25-3-2010, proposing to tax the capital gain tax arising from development agreement in the Asst year 2005-06. In a petition filed by the assessee the Hon'ble Bombay High court allowed the petition and quashed the notice issued under section 148.

[Source: Amar R. Shanbag v ITO (WP NO 552 of 2011 dt 18-7-2011 (593 (2011) 43A BCAJ- August – p 29)]

Sec 147: Reassessment- Reason to believe- Change of opinion- Within period of Four years

Once an assessment has been completed u/s 143 (3) after raising a query on a particular issue and accepting assessee's reply to the query, Assessing Officer has no jurisdiction to reopen the assessment merely because the issue in question is not specifically adverted in the assessment order, unless there is tangible material before the Assessing Officer to come to the conclusion that there is escapement of income. (Asst Year 1998-99).

[Source: Asst CIT v Rolta India Ltd (2011) 57 DTR 370 / 139 TTJ 385(Mumbai) (TM) (Trib)]

Sec 158BC: Block assessment- Search and Seizure- Warrant of authorization- Joint names- Assessment in the name of Individual is not invalid

Warrant of authorization issued in the names of three companies including assessee, separated only by a comma without the word "and" between the names of the companies is a common warrant in the case of said three companies and not a warrant in the joint names of three companies and therefore, the block assessment order framed in the individual name of the assessee company is not invalid.

[Source: Radan Multimedia ltd v Dy CIT (2011) 58 DTR 129 (Mumbai) (Trib)]

Tax Deduction at Source

Sec 194E: Deduction of tax at source- Payments to non resident sportsman or sports association- Umpires- Match referees are neither sports men nor are they on resident sports association or institution (S. 115BBA)

Amounts paid to foreign team for participation in match in India in any shape, either as prize money or as administrative expenses, is income deemed to have accrued in India and is taxable under section 115BBA and thus, section 194E is attracted. However, payments made to umpires or match referees do not come with in purview of section 115BBA because umpires and match referee are nether sportsmen (including an athletic) nor are they non resident sports association or institution so as to attract provisions contained in section 115BBA and therefore, liability to deduct tax at source under section 194E does not arise. (Asst Year 1996-97).

[Source: Indcom v CIT (2011) 200 Taxman 40/ 58 DTR 1 / 335 ITR 485/ 242 CTR 337(Cal) (High Court)]

Penalty

Sec 271(1)(C): Penalty- Concealment-Non genuine gift claimed as capital gains-Transfer of tenancy right

In the return of income the assessee declared Rs 17 lakhs as long term capital gains arising from transfer of tenancy right and paid tax @ 20% applicable to long term capital gains. Claim of assessee was that amount paid for receiving the gift was from the cash received on surrender of tenancy right. Assessing officer held that as there was no supporting evidence the amount was assessed as income from undisclosed sources. The Tribunal held that as tax sought to be evaded is very clear as the tax rate applicable on the impugned receipt of Rs.17 lakhs is 30% being income from undisclosed sources, whereas the assessee has paid 20% claiming the same to be capital gain on transfer of tenancy right, provisions of Explanation 1 are not applicable to the instant case as tax sought to be evaded was because of the lower rate of tax paid and not because of any addition to the income and, therefore, penalty is imposable under the main provisions of s.271(1)(c).

[Source: Harish P.Mashruwala v Asst CIT (2011) 139 TTJ 563 (Mumbai) (SB) (Trib)]

Sec 71(1)(C): Penalty- Concealment- Survey- Surrender of additional income

Assessee having surrendered additional income following detection of certain discrepancies in the documents found during the survey proceedings at its premises despite filing an explanation and AO proceeded to assess the said income on the basis of the surrender made by the assessee Penalty under section 271(1) (C) is not leviable. (Asst Year 2005-06).

[Source: Ajay Sangari & Company v Additional CIT (2011) 57 DTR 397 (Chd) (Trib)]

➤ Notification

Exemption of Interest from PO Saving Account

Post Office Savings Bank Account exempt to an extent of the interest of Rs. 3,500/- in the case of an individual account and Rs. 7,000/- in the case of joint account. This notification shall come into force from the date of its publication in the Official Gazette. [Notification No. 32/2011 [F. No. 173/13/2011-ITA.I] /S.O. 1296 (E), Dated 3-6-2011]

Revised Limit for Filing Departmental Appeals

The Central Board of Direct Taxes (CBDT) has prescribed monetary limits and other conditions for filing departmental appeals (In Income-tax matters) before Appellate Tribunal, High Courts and Supreme Court as follows:-

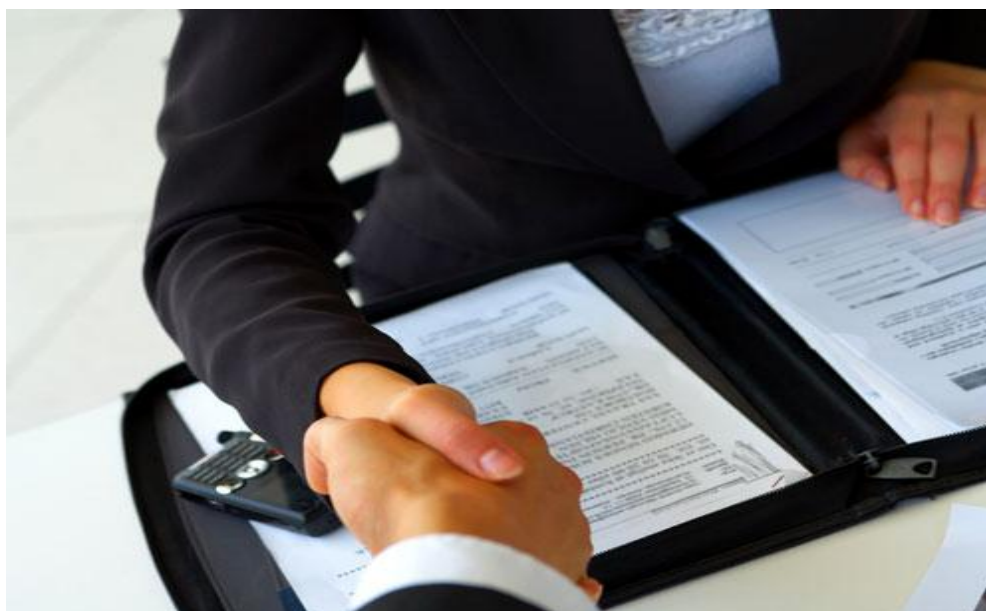
S. No.	Appeals in Income-tax matters	Monetary Limit (In Rs.)
1.	Appeal before Appellate Tribunal	3,00,000
2.	Appeal u/s 260A before High Court	10,00,000
3.	Appeal before Supreme Court	25,00,000

[CBDT Instruction No. 3/2011 [F. NO. 279/MISC. 142/2007-ITJ], DATED 9-2-2011]

Non-inclusion of audits conducted under sections 44AD, 44AE and 44AF

The audits conducted under section 44AD, 44AE and 44AF of the Income-tax Act, 1961 shall not be taken into account for the purpose of reckoning the “specified number of tax audit assignments”.

[Source: ICAI Clarification dt 23.08.2011]



INDIRECT TAX

Service Tax

➤ Case Laws

Cenvat credit of Canteen Service

Cenvat credit of Service Tax- Input service- Canteen service- Outdoor caterer services for providing food to staff- Facility provided because of statutory obligation imposed under Section 46 of Factories Act, 1948 and it becoming condition of Service as far as employees concerned- Expenses incurred considered in fixing price- Activity may be welfare measure but not charity provided by employer to employees- Test whether service utilized for manufacture directly or indirectly or used in relation to activities relating to business- Credit available- Rule 2(l) of Cenvat Credit Rules, 2004.

[Source: Commr. of C. Ex., Bangalore-III v Stanzen Toyotetsu India (P) Ltd, 2011(23) STR 444 (kar.)]

Cenvat Credit to Warehouse Service

Availment of Cenvat credit – Storage and Warehousing service provider – Using cement and TMT bar for construction of warehouses – Without use of these items, assessee could not provide storage and warehousing services – In that view, they were entitled to credit of Central Excise duty paid on these items – Rules 2 and 3 of Cenvat Credit Rules, 2004 – Section 65(102) of Finance Act, 1994.

[Source: Commr. of C. Ex., Vishkhapatnam-II v Sai Sahmita Storages (P) Ltd, 2011 (23) STR 341 (AP)]

Distribution of Cenvat Credit

The Company is a manufacturer with more than one unit – Invoice issued by head office, registered as ‘input service distributor’ in Chennai, for various services like insurance, telephones, advertising, etc., availed by unit in Cuttack – Credit of Service tax thereon distributed to unit in Kolar, who used it for payment of Central Excise Duty – HELD : Credit could not be denied on ground that input services were not used/ received in relation to manufacture of goods in Kolar – Registered input service distributor is entitled to distribute credit, subject to conditions prescribed in Rule 7 of Cenvat Credit Rules, 2004.

[Source: Commissioner of C. Ex., Bangalore-I Versus Ecof Industries Pvt. Ltd., 2011 (23) S.T.R. 337 (Kar.)]

More than One Refund Claim for Same Period is Against Law

Refund – Cenvat credit accumulated on export of goods – More than one refund claim filed for same quarter is violation of condition no. 2A of appendix of Notification No. 5/2006-C.E. (N.T.), and is not sustainable – Factually incorrect statement by consultant of exporter that their claims were for different quarters indicated their knowledge that more than one application per quarter was not maintainable – In that view, rejection of refund upheld – Rule 5 of Cenvat Credit Rules, 2004 – Section 11B of Central Excise Act, 1944.

[Source: Nemlaxmi Books (India) P. LTD. v Commissioner of C. Ex., SURAT 2011 (23) S.T.R. 367 (Tri. – Ahmd.)]

Technical Barrier Should not be Impediment to Grant Appropriate Relief

Banking and Other Financial services – Exemption under Notification No. 29/2004-S.T. for tax on interest in relation to overdraft, cash credit, bill discounting or exchange – Condition that interest be separately shown in invoice, alleged to be not fulfilled as requirement of giving certain descriptions not fulfilled – HELD: Assessee a banking company regulated by RBI guidelines and public norms requiring disclosure of Bank's earnings – Technical barrier should not be impediment to grant appropriate relief if authorities satisfied that income separately disclosed – Strict instruction unwarranted if assessee primarily falls within exemption zone – Matter remanded – Assessee to adduce evidence before adjudicating authority.

[Source: *State of Bank of Indore v Commissioner of C. Ex., Indore, 2011 (23) S.T.R. 346 (Tri. – Del.)*]

Central Excise

➤ **Case Laws**

Cenvat Credit of Inputs used in Exempted Products

Availment of Cenvat/ Modvat for Exempted products, viz, menthol crystals, exported under bond without payment of duty- Case is covered under Rule 6(6)(v) of Cenvat Credit Rules, 2004- in that view, Rules 6(1) to 6(4) ibid were not applicable, and assessee was entitled to credit of duty paid on inputs, viz, menthol- Disallowance of input credit under these Rules is applicable only when inputs used in manufacture of exempted final products are cleared for home consumption without payment of duty.

[Source: *Union of India v Sharp Menthol India Ltd., 2011 (270) ELT 212 (Bom)*]

Balance Sheet v. RT-12 Returns as Evidence

No proposition of law that Balance Sheet will prevail in case of conflict between balance sheet prepared by professional CA and RT-12 returns- Facts and circumstances to be considered- Both are pieces of evidence and which deserve acceptance is to be decided on basis of further evidence available.

[Source: *Commissioner of C.Ex. Patna v Universal Polythelene Industries, 2011 (270) ELT 168 (Pat.)*]

Clandestine Removal

Proof of clandestine removal- Private records found in factory of assessee and recovered from possession of their employees, showing suppression of production- HELD: Assessee had the burden to prove that documents were wrong and did not belong to them- Having not discharged it, finding of suppression of production and confirmation of demand was sustainable- Rules 11 and 25 of Central Excise Rules, 2002.

[Source: *Somani Iron & Steels Ltd. v CESTAT, 2011 (270) ELT 189 (All.)*]

Taking Cenvat Credit Before Payment

Input service- Credit taken at the end of month but payment to service provider made on fifth of month- the Department objected that the credit could not be taken on or before the date on which the service tax has been paid. But it was not denied by the department that service tax has been paid and hence there is gap of only five days between the date of taking credit and payment of service tax. The Tribunal held that taking of

credit before payment of service tax- was only a technical lapse, for which assessee could not be denied credit- Rules 9 of Cenvat Credit Rules, 2004

[Source: **J.K. Sugar Ltd. v Commissioner of Central excise, Meerut-II, 2011 (270) ELT 225 (Tri.- Del.)**]



COMPANY LAW UPDATES

➤ Circulars/Notification

Amendment of Companies (Central Government's) General Rules and Forms, 1956

The Ministry of Corporate Affairs has amended the Companies (Central Government's) General Rules and Forms, 1956 and the new rules may be called as Companies (Central Government's) General Rules and Forms (Amendment) Rules, 2011. These rules will come into force with effect from 12th day of August, 2011. Further, Form 23AC and Form 23ACA has also been substituted with new Forms.

[Source: MCA Notification No. G.S.R. (E) dated 11.08.2011]

Company Law Settlement Scheme, 2011

In order to give an opportunity to the defaulting companies to enable them to make their default good by filing belated Balance Sheets and Annual Returns and to become a regular compliant in future, the Ministry, in exercise of the powers under section 611(2) and 637B (b) of the Companies Act, 1956 has decided to introduce a Scheme namely, "Company Law Settlement Scheme, 2011," condoning the delay in filing documents with the Registrar, granting immunity from prosecution and **charging additional fee of 25 percent of actual additional fee payable** for filing belated documents under the Companies Act, 1956 and the rules made there under.

The Scheme shall come into force on the 12th August, 2011 and shall remain in force up to 31st Oct, 2011.

[Source: MCA Circular No. 59/2011 dated 05.08.2011]

Corrigendum to Company Law Settlement Scheme, 2011

In continuation of the Ministry's General Circular No. 59/2011 dated 05.08.2011 on the subject cited above, it is stated that the said scheme shall be applicable to Form 52 (filing of annual accounts by a foreign company) as foreign companies are included in the scheme.

[Source: MCA Circular No. 60/2011 dated 10.08.2011]

Corrigendum to General Circular No. 54/2011

Ministry of Corporate Affairs has decided to amend Para (c) the Circular No. 54/2011 dated 26th July, 2011 which dealt with pro active action in case of winding up petitions. Earlier the power to verify information required by the Official liquidator was given to Chartered Accountants only and now even a Company Secretary and a Cost Accountant in practice have been included.

[Source: MCA Circular No. 58/2011 dated 01.08.2011]

SEBI & RBI UPDATES

➤ Circular

SEBI Updates

Redressal of investor grievances against stock brokers and sub-brokers in SEBI Complaints Redress System (SCORES)

1. SEBI has commenced processing of investor grievances in a centralized web-based complaints redressal system, 'SCORES'. The salient features of this system are:

- Centralized database of all complaints;
- Online movement of complaints to the concerned entities;
- Online upload of Action Taken Reports (ATRs) by the concerned entities; and
- Online tracking of status of complaints by investors.

2. The investor grievances received by SEBI against stock brokers and sub-brokers will be taken up electronically with the concerned stock exchange(s) through SCORES (<https://scores.gov.in/Admin>). The stock exchange(s) shall, in turn, take up the matter with the concerned stock brokers/subbrokers.

3. The stock brokers and sub-brokers shall take adequate steps for redressal of grievances within one month from the date of receipt of the complaint and keep the investor/stock exchange(s) duly informed of the action taken thereon. Failure to comply with the said requirement will render the stock broker liable for penal action.

[Source: SEBI Circular No. CIR/MIRSD/18/2011 dated August 25, 2011]

Issuance of Non-Convertible Debentures (NCDs)-Minimum Rating of NCDs

In view of the standardization of rating symbols and definitions for credit rating agencies by Securities Exchange Board of India (SEBI), the Reserve Bank of India has issued an amendment Direction, i.e., **Issuance of Non-Convertible Debentures (Reserve Bank) (Amendment) Directions, 2011, inter alia, revising the symbol of minimum rating required for issuing NCDs of maturity up to one year.** The amendment Directions comes into immediate effect.

[Source: RBI Notification RBI/2011-12/157 IDMD.PCD. 08/14.03.03/2011-12 dated August 23, 2011]

RBI releases Draft Guidelines for Licensing of New Banks in the Private Sector

The Reserve Bank of India released on its website, the Draft Guidelines for “Licensing of New Banks in the Private Sector”. The Reserve Bank has sought views/comments on the draft guidelines from banks, non-banking financial institutions, industrial houses, other institutions and the public at large. Suggestions and comments on the draft guidelines may be sent by October 31, 2011.

Key features of the draft guidelines are:

- (i) **Eligible promoters:** Entities / groups in the private sector, owned and controlled by residents, with diversified ownership, sound credentials and integrity and having successful track record of at least 10 years will be eligible to promote banks..- diversified promoters not clarified.
- (ii) **Corporate structure:** New banks will be set up only through a wholly owned Non-Operative Holding Company (NOHC) to be registered with the Reserve Bank as a non-banking finance company (NBFC) which will hold the bank as well as all the other financial companies in the promoter group.
- (iii) **Minimum capital requirement:** Minimum capital requirement will be `Rs. 500 crore. Subject to this, actual capital to be brought in will depend on the business plan of the promoters. NOHC shall hold minimum 40 per cent of the paid-up capital of the bank for a period of five years from the date of licensing of the bank. Shareholding by NOHC in excess of 40 per cent shall be brought down to 20 per cent within 10 years and to 15 per cent within 12 years from the date of licensing of the bank.
- (iv) **Foreign shareholding:** The aggregate non-resident shareholding in the new bank shall not exceed 49 per cent for the first 5 years after which it will be as per the extant policy.
- (v) **Corporate governance:** At least 50 per cent of the directors of the NOHC should be independent directors. The corporate structure should be such that it does not impede effective supervision of the bank and the NOHC on a consolidated basis by the Reserve Bank.
- (vi) **Business model:** Should be realistic and viable and should address how the bank proposes to achieve financial inclusion.
- (vii) **Other conditions:**
 - The exposure of bank to any entity in the promoter group shall not exceed 10 per cent and the aggregate exposure to all the entities in the group shall not exceed 20 per cent of the paid-up capital and reserves of the bank.
 - The bank shall get its shares listed on the stock exchanges within two years of licensing.
 - The bank shall open at least 25 per cent of its branches in unbanked rural centres (population upto 9,999 as per 2001 census)
 - Existing NBFCs, if considered eligible, may be permitted to either promote a new bank or convert themselves into banks.
- (viii) In respect of promoter groups having 40 per cent or more assets / income from non-financial business, certain additional requirements have been stipulated.

[Source: RBI website www.rbi.org]

CORPORATE FINANCE

➤ Latest News

MERGER & ACQUISITIONS

Singapore's Olam buys Hemarus Industries in \$74m deal

Singapore-listed Olam International Ltd, a supplier of agri and food commodities, is acquiring Hemarus Industries Ltd at an enterprise valuation of \$73.8 million or Rs 340 crore. The deal involves a cash payment of \$8 million and part assumption of debt of approximately \$66 million upon completion of acquisition of the Hyderabad-based firm.

[Source: The Hindu Business Line, September 01, 2011]

Google snaps up Motorola mobility

Google has outlined its largest and boldest acquisition yet with the agreement to pay \$12.5bn in cash for Motorola Mobility. The deal will see Google pay \$40 per share for Motorola Mobility – a 63 per cent premium to the company's closing share price on Friday – and gain the \$3bn of cash sitting on Motorola's books. Google had \$36bn in cash on its balance sheet at the end of June. The acquisition, expected to close by the end of the year or in early 2012.

[Source: Bloomberg, August 15, 2011]

NIIT Technologies acquires Madrid-based software firm Proyecta

IT solutions company NIIT Technologies Ltd has acquired Madrid-based software services firm Proyecta Sistemas de Informacion SA for an undisclosed amount, a move that will further boost its European business. Proyecta is a software services firm headquartered in Madrid (Spain), with more than 100 consultants on board. The company offers IT services in focused areas across tourism, airlines, financial services and banking space. It also enjoys strong relationship with leading industry players in business intelligence, Web and mobility applications.

[Source: Livemint, August 15, 2011]

Ram Kaashyap investment to buy oil firm Gemmia for \$150m

Ram Kaashyap Investment Ltd, a Chennai-based small cap firm with diversified business interests, is acquiring 100 per cent stake in Gemmia Worldwide S.A., an oil sludge treatment and recycling firm based in Tortola (British Virgin Islands), for \$150 million (Rs 670 crore). The deal is to be financed through a mix of overseas bond and share sale.

[Source: VCcircle, August 04, 2011]

VENTURE CAPITAL

IIT-Bombay education start-up inopen raises \$0.5m

InOpen Technologies, an IIT Bombay-based start-up which develops educational content and teacher training solutions, has raised \$500,000 in seed funding from Ventureast Tenet Fund II, an early-stage investor. The funds will be used for research, hiring and growing its network of camps and centres for training students and teachers.

[Source: The Venture Bay, August 24, 2011]

Matrix partners invests Rs45cr in kids clinic

Matrix Partners India has invested Rs 45 crore in the first round of institutional funding for Kids Clinic India Pvt Ltd, which provides maternity and infant care under the brand Cloud Nine. Kids Clinic, founded in 2007, currently operates two facilities in Bangalore and has more than 6,500 deliveries to its credit. In addition to maternal care, Cloud Nine also provides gynaecology and neonatal care services.

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

YourNextLeap raises series a funding from nirvana venture

Web-based recommendation engine YourNextLeap.com, which acts as a virtual career counsellor and helps students make smart career decisions, has raised an undisclosed sum in series A funding from Nirvana Venture Advisors, the early-stage venture capital fund of the Patni family.

[Source: Economic times , August 18, 2011]

PRIVATE EQUITY

Prizm payments raises \$8M more from sequoia capital

Venture capital firm Sequoia Capital has invested \$8 million in Chennai-based Prizm Payment Services Pvt Ltd, an electronic payment service provider. With this additional funding, Sequoia has invested a total of \$15 million in the company till date.

[Source: Livemint, August 5, 2011]

Sms gupshup raises Rs45cr in series e-funding

Mumbai-based mobile group messaging service SMS GupShup has raised \$10 million (Rs 45 crore) in the series E round of fundraising from venture capital investors, the company has said in a statement. With this round of funding, SMS GupShup has raised a total of \$47 million (Rs 215 crore) so far.

[Source: The Economic times, August 31, 2011]

IFC invests \$15m in Shalivahana green energy

International Finance Corporation (IFC) is investing \$15 million in equity financing in Shalivahana Green Energy Ltd, a Secunderabad-based biomass power company. The new round of funding will help the company enhance the capacity of its existing biomass power projects by 200 MW. Shalivahana's facilities are spread across Chhattisgarh, Jharkhand, Madhya Pradesh, Orissa and Tamil Nadu. **The World Bank arm will also purchase up to 1.5M CERs from the company's energy projects developed during 2013-20.**

[Source: The Hindu Business Line, August 8, 2011]

Blackstone to invest \$200m in Embassy's Bangalore SEZ

Private equity giant Blackstone is investing around \$200 million (Rs 875 crore) in a special economic zone (SEZ), promoted by Bangalore-based real estate developer Embassy Property Developments Ltd. The private equity firm is picking up 37 per cent in the development, valuing it at nearly \$550 million (Rs 2,400 crore), said a source familiar with the development.

[Source: The Venture Bay, August 2, 2011]

Jacob Ballas, Kitara capital to invest Rs. 127cr in Vivimed Labs

Hyderabad-based Vivimed Labs Ltd is raising Rs 127.5 crore from Jacob Ballas Capital and Kitara Capital, with the two private equity firms taking over a 13 per cent stake each in the listed firm. NYLIM Jacob Ballas India Fund, advised by Jacob Ballas Capital, is buying compulsorily convertible and cumulative preference shares (CCPS) for Rs 67 crore. The CCPS, which will carry a fixed dividend of 3.5 per cent per year, will be convertible within 18 months at Rs 315 per share. Dubai-based Kitara Capital is investing through direct equity in the company, picking up 1.85 million shares at Rs 327 each, amounting to Rs 60.5 crore.

[Source: Newspolitan, August 27, 2011]

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