



RNM ALERT

Thinking of the Bottom Line – Think of Us

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U.N. Marwah

Dear Readers,

RNM is celebrating its diamond jubilee year during 2011 having been in service for the last 65 glorious years. It marks a major milestone in the journey of RNM and we hope with the support and encouragement of all stakeholders- clients, employees, partners, associates and family, the growth and momentum would continue. RNM has grown to a full service practice firm in the domain of Direct Tax, Indirect Tax, Corporate & Legal, Audit & Assurance, Corporate Finance and Information Technology Consulting.

The Ministry of Corporate Affairs has with the intention of forcing better compliance, made certain changes restricting defaulting companies and their Directors from making any further filings (except certain prescribed forms) with effect from July 3, 2011. This has resulted in Groups having various number of companies, some inactive, to ensure proper updation of all inactive companies also and will go a long way in corporates following a more disciplined approach.

The DEPB Scheme has been extended upto September 30, 2011 which would be a welcome step for exporters, many of whom are yet to recover from the global slowdown.

The SEBI has mandated that 100% of promoter holdings should be in demat form latest by September 30, 2011 to enable companies to remain in the normal segment of the Exchange.

Team RNM would like to remind all our Readers that the last date of filing of income tax returns for the financial year 2010-11 for individual assessee's, HUF's and firms not covered under Tax Audit provisions is July 31 and it is always better to make filings well in time and avoid last minute rush. It is better to be early than sorry!!

Regards,

U.N. Marwah

For and behalf of the RNM Alert Editorial Board

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DIRECT TAX

➤ Case Laws

Deemed Dividend

Sec2(22)(e) - Deemed dividend-Transfer of sum from one company to another

Assessee is a director in two companies holding substantial shareholding in both. Certain sum was transferred from one company to another at instance of assessee. Assessee having substantial credit balance with company, cannot be held as loan or deposit nor can be assessed as deemed dividend (Asst years 2001-02, 2005-06).

[Source: Asst vs. C. Rajini (Smt) (2011) 9 ITR (Trib) 487 (Chennai) (Trib). Dy CIT v C. Subba Reddy (HUF) (2011) 9 ITR (Trib) 487 (Chennai) (Trib)]

International Taxation

Sec9 - Income deemed to accrue or arise in India-DTAA-India-Netherlands - (Art 12)

One of the group companies of assessee, located at Netherlands had acquired musical recording rights from other repertoire companies and granted commercial exploitation rights of such musical track in India to "U" Ltd. The assessee received

royalty for four years from "U" Ltd. The royalty agreement was approved by Government of India. Further assessee had filed a certificate from tax authority of Netherlands having jurisdiction over it in which it was certified that assessee was beneficial owner of royalty income received from "U" Ltd, within the meaning of article 12 of DTAA. Thus, the assessee was beneficial owner of royalty and same had to be taxed at rate of 10 percent for all the years. (Asst years (2000-01 to 2003-04).

[Source: Asst DIT v Universal International Music BV (2011) 45 SOT 219 (Mum)(Trib)]

Sec9 - Income deemed to accrue or arise in India-Salary to staff at Netherland (S40(a)(iii), 192)

Assessee did not deduct tax at source on salary payments made to staff at Netherlands. Assessing officer invoked the provisions of 40 (a) (iii), and disallowed the payments made on the ground that the tax was not deducted under section 192. The Tribunal held that since salaries had been paid to non-residents for services rendered abroad, provisions of

Explanation to section 9 (1) (ii) were not applicable to assessee. Since salary paid to non resident's for services rendered in Netherlands was not chargeable to tax in India, provisions of section 192 cannot be applied hence disallowance made by applying the provisions of section 40(a) (iii) were liable to be deleted. (Asst Year 2003-04).

[Source: Dy CIT v Mother Dairy Fruits & Veg (P) Ltd (2011) 45 SOT 186 (Delhi) (Trib)]

Sec9 - Income deemed to accrue or arise in India-Royalty or fee for technical services-Bandwidth charges paid to foreign companies for data communication (S40(a)(i), 195)

Where the assessee had made payments to service providers such as AT&T or MCI Telecommunications for use of band width provided for down linking signals in United States and it was found that the payments were not in the nature of managerial, consultancy or technical services nor was it for use or right to use industrial, commercial or scientific equipment. The

payment was not in the nature of royalty or fee for technical services assessee was not liable to deduct tax at source. (Asst Year 2004-05).

[Source: *Infosys Technologies Ltd v Dy CIT* (2011) 45 SOT 157 (Bang) (Trib)]

Exemption u/s 10 & 12

Sec10B(6)(ii) - Exemption- Depreciation- Unabsorbed- Carry forward and set off- Exempted income -Income from other sources(S32(2),56,72(2))

Assessee being entitled to deduction under section 10B upto asst year 2005-06, provisions of section 10B (6) are not applicable in the relevant asst year, i.e. 2004-05 and therefore unabsorbed depreciation brought forward from asst year prior to asst year 2000- 01 can be set off against business income or against any other head of income, including income from other sources. (Asst year 2004-05)

[Source: *Dy CIT v Akay Flavours & Aromatics (P) Ltd* (2011) 55 DTR 1/ 130 ITD 219(Coch) (TM) (Trib)]

Sec12A - Charitable Trust - Registration as Public Trust not necessary for S12A "Charity" registration
Registration as a Public Trust is not a condition precedent for

grant of registration u/s. 12A. There is no requirement in the Income-tax Act that the institution constituted for advancement of charity, must be registered as a trust under the Public Trusts Act. Agriculture Produce and Market Committee 291 ITR 419 (Bom) & Disha India Micro Credit (Del.), followed. [Source: *Grameen Initiative for Women v DIT* (E), (ITAT) (Mumbai) (www.itatonline.org)]

Disallowance u/s 14A

Sec14A

Where assessee had invested in shares by using borrowed funds, but had neither received any dividend from investment nor had it claimed any income as not includible in its total income, no disallowance under section 14A could be made for relevant assessment year.

[Source: 2011] 11 taxmann.com 404 (Chennai - ITAT)]

Profit & Gain from Business & Profession

Sec28 - Capital gains - Shares PMS fee, even if NAV based, is deductible in computing PMS capital gains - (S48)

In computing capital gains u/s 48, payments are deductible in two ways, one by taking full value of consideration net of

such payments and the other by deducting the same as "expenditure incurred wholly and exclusively in connection with the transfer". The expression "full value of consideration" contemplates additions and deductions from the apparent value. It means the "real and effective consideration", which can be arrived at only after allowing the deductible expenditure. The PMS fee, on profit sharing basis, was for the twin purposes of acquisition and sale of the securities. The fact that bifurcation between the two is not possible is not relevant. Accounting Standard 13 (Accounting for Investments) issued by ICAI provides that brokerage, fees and duties have to added to the cost of investments. (AY:2004 - 05 to 2006-07). *CIT v Shakuntala Kantilal* (1991) 190 ITR 56 (Bom) followed; *Devendra Kothari* (2011) 50 DTR 369 (Mum) (Trib) not followed.

[Source: *KRA Holding & Trading P. Ltd. v DCIT* (ITAT) (Mum) (www.itatonline.org)]

Sec28(i) - Business income- Adventure in the nature of trade-Purchasing land under acquisition by Government- Interest on compensation- Income from other sources. (S2(13),(2(14),56)

Compensation received on purchasing land notified for Acquisition by the Government, not held as capital asset was liable to be taxed as business income, as such transaction fall under definition of “adventure in the nature of trade” u/s. 2(13). Interest on compensation on compulsory acquisition of land is taxable as business income and not as income from other sources.

[Source: Dy CIT v Gopal Ramnarayan Kasat (2011) 240 CTR 266 / 54 DTR 228 (Bom)(High Court)]

Sec28(iv) - Business income-Waiver of loan taken

Waiver of loan taken by assessee for business activity, assessable as business income. Investment Company taking loan and investing for long term in shares, no communication and no claim for many years by lender and unsecured loan written back that is remission of liability, no deduction claimed in respect of loan is not income.

[Source: Logitronics P. Ltd v CIT (2011) 333 ITR 386 (Delhi) (High Court.) CIT v Jubilant Securities P. Ltd (2011) 333 ITR 386 (Delhi)(High Court)]

Sec36(1)(vii) - Bad debt-Business expenditure – Alternative claim- If “bad debt” not allowable u/s 36(1)(vii), claim for deduction

u/s 37(1) can be raised for first time even before High Court . - S37(1)

If loss of debt does not come within S. 36(1)(vii), a claim can be made u/s. 37(1). Merely because claim was made under one provision of Act and not under another provision, it does not debar the assessee from claiming deduction u/s. 37(1) even if it was not raised before lower authorities.

[Source: Mohan Meakin Limited vs CIT (Delhi, High Court) www.itatonline.org.]

Sec37(1) - Business expenditure-Capital or revenue- Expenditure on abandoned expansion plans

The assessee had incurred expenditure on engaging services of consultants for improving operational efficiencies inextricably linked to the existing business. The project was abandoned, with no new asset to be created. The expenditure held to be revenue expenditure. (Asst year 2000-2001)

[Source: Indo Rama Synthetics India Ltd v. CIT (2011) 333 ITR 18 (Delhi, High Court). Editorial: SLP rejected (2010) 328 ITR (St) 9 (SC)]

Sec37(1) - Business expenditure-Professional’s heart surgery expense not deductible (S31)

Expenditure incurred on heart operation was not deductible u/s. 31 as also 37(1) because of following reasons:

1) Heart cannot be considered plant as it did not have any mention in assessee’s balance sheet under assets and its cost of acquisition could not be determined.

2) Deduction u/s. 37(1) cannot be granted as the expenditure incurred does not have any immediate or direct nexus between the expenses incurred on surgery and his efficiency in the professional field per se.

[Source: Shanti Bhushan vs CIT (Delhi, High Court). www.itatonline.org.]

Capital Gain

Sec45 - Capital gains-Transfer of shares-Wholly owned subsidiary-Without consideration(S48,92, 92C, 195)

Transfer of shares to subsidiary company without consideration, would not attract liability to tax under section 45 read with section 48, as the consideration is inapplicable on the date of transfer. As no income is chargeable to tax, provisions of section 195 or provisions of sections 92 to 92F would not apply.

[Source: Good Year Tire & Rubber Co, IN RE. (2011) 240 CTR 209/ 54 DTR 281/ 334 ITR 69 (AAR)]

Sec50 - Capital Gains – Depreciable Assets – Loss – Carry Forward and Set off of brought forward business loss

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

[Source: Digital Electronics Ltd. vs. Addl. CIT (2011) 49 DTR 484/135 TTJ 419 (Mum.)(Trib)]

Sec50 - Capital Gains – Depreciable Assets – Loss – Carry Forward and Set off

On the same reasoning Mumbai ITAT held in case of Manali Investment that brought forward long term capital loss can be set off against short term capital loss arising from transfer of depreciable capital asset held for more than 36 months.

[Source: ITA No. 6646/Mum/2008, A.Y. 2005-06]

Undisclosed Income

Sec68 - Cash credits- Existence of books of account

Where the assessee had not maintained books of account, there was no legal scope to invoke provisions of section 68. Existence of books of account by assessee is a condition precedent for making addition under section 68.

[Source: Madhu Raitani v Asst CIT (2011) 45 SOT 231 (Gau) (TM) (Trib)]

Deduction u/s 80IB

Sec80IB - Deduction- Small scale industrial undertaking- Not claiming the relief in initial year cannot be the bar for claiming in later years

Registration of an Industrial undertaking as a small scale industrial undertaking under Industries (Development and Regulations) Act, 1951, is not a condition precedent for treating the same as a small-scale industrial undertaking and it is sufficient if it fulfils the eligibility criteria for being regarded as a small scale industrial undertaking for the purposes of said Act. Assessee cannot be deprived the benefit of section 80IB merely because he has not claimed such benefit in the initial year in which he

was eligible to claim the benefit. (Asst year 2004-05).

[Source: Praveen Soni v CIT (2011) 54 DTR 334 (Delhi) (High Court)]

Assessment Procedures

Sec139(5) - Revised return- Intimation (S. 143 (1)(a))

An intimation under section 143(1)(a) of the Act cannot be equated with an assessment framed under section 143 (3) of the Act and the Assessing Officer cannot refuse to process the revised return and modify the intimation in accordance with section 143 (1B) of the Act. (Asst year 1995-96).

[Source: CIT v Himagiri Foods Limited (2011) 333 ITR 508 (Delhi, High Court)]

Sec148 - Reassessment- Notice-Limitation- Meaning of “issue”. (S.149)

Notice for the assessment year 2003-04 was signed on 31-3-2010 and sent to speed post centre on 7-4-2010. The court held that date of issue would be date on which notice was handed over for service to proper officer, hence notice was barred by limitation.

[Source: Kanubhai M Patel (HUF) v Hiren Bhatt or his successors to Office and others (2011) 334 ITR 25 (Guj) (High Court)]

Sec148 - Reassessment-Notice- Old address- Participates in assessment proceedings (S149, 292BB)

When assessee does not raise objection regarding non issue of notice and appears before the Assessing officer and assessing officer gives copy of notice under section 148, Assessee participates in the assessment proceedings. The service of notice even at the old address of the assessee constitutes service of notice within ambit of section 148. What is contemplated under section 149 is the issue of notice under section 148 and not the service thereof on the assessee and the service of notice under section 148 is only required before assessment, reassessment or recomputation. (Asst. year 1999-2000).

[Source: CIT v Three Dee Exim (P) Ltd. (2011) 55 DTR 147 (Delhi) (High Court)]

Sec153C - Search and seizure-Assessment in case of any other person – Assessment sans “speaking” & “incriminating” documents void (S132)

For purpose of attracting S. 153C, the document seized must not only be a ‘speaking one’, but also prima facie ‘incriminating one’. The

documents cannot be said “incriminating one”, merely because it contains the notings of entries which are already recorded in books of accounts or is subjected to scrutiny of Assessing officer in the past in regular assessment u/s. 143(3) of the Act.

[Source: **Sinhgad Technical Education Society vs ACIT (Pune)(Trib).** www.itatonline.org]

Tax Deduction at Source

Sec192 -TDS to be deducted on tips passed to employees by Hotel employers who have collected them from customers

In the case of **ITC Ltd v. CIT** [2011-TIOL-287-HC-DEL-IT], the Delhi High Court(HC) held that the tips or service charges distributed to employees are to be treated as part of salary and tax is required to be withheld under section 192 of the Income-tax Act (the Act) from the same. The AO treated the value of these tips as ‘salary’ and held that the assesseees were liable to withheld tax at source from such payments under section 192 of the Act.

[Source: **The CIT- Tds v ITC Ltd.ITAs No.475/2010, 476/2010, 860/2010**]

Tax Administration

CBDT Circular on monetary limits for filing appeals applies to pending appeals

The Tribunal had to consider whether Instruction No. 3/2011 dated 9.2.2011 which provides that the department should not file appeals before the Tribunal in cases where the tax effect does not exceed Rs. 3 lakhs would apply to pending appeals as well. HELD deciding in affirmative:

As per Instruction No. 3 of 2011 dated 09.02.2011 appeal before Tribunal can be filed where the tax effect exceeds the monetary limit of Rs. 3 lakhs. However, considering the similar situation where tax limits were modified by the CBDT Instruction No. 5 of 2008 the jurisdictional High Court in Madhukar K. Inamdar (HUF) 318 ITR 149 held that the circular will be applicable to the cases pending before the court either for admission or for final disposal. In view of the order of the jurisdictional High Court we hold that Instruction No. 3 dated 09.02.2011 is applicable for the appeal preferred by the Revenue. Therefore, the appeal is dismissed on the issue of tax effect involved.

[Source: **ITO vs. Laxmi Jewel Pvt Ltd (ITAT Mumbai) ITA No. 2165/Mum/2010**]

Sec254(2) - Appellate Tribunal- Rectification of Mistakes – orders not cited- Tribunal entitled to do “own research” and rely on non-cited cases

Reliance and reference to reasons stated in another decision cannot be regarded as a mistake apparent from the record. It is not unusual or abnormal for Judges or adjudicators to refer and rely upon judgements / decisions after making their own research.

[Source: Geofin Investment (P) Ltd. vs. CIT (Delhi) (High Court)]

Penalty

Sec271(1)(c) - Penalty- Concealment- Despite detection in survey, Concealment penalty cannot be levied if income was offered in return filed (S133A)

Penalty u/s. 271(1)(c) can be levied only if Assessing officer ‘during the course of proceedings’ is satisfied that there is ‘concealment’ or ‘furnishing of inaccurate particulars’. Where assessee offers detected income in the return, there was neither concealment nor furnishing of

inaccurate particulars. Thus penalty u/s. 271(1)(c) cannot be levied.

[Source: CIT vs SAS Pharmaceutical (Delhi) (High Court). www.itatonline.org]

Sec271(1)(c) – Penalty- Concealment- Failure to disallow u/s 14A there cannot be penalty

As there is no allegation by the AO that there was collusion between the auditor and the assessee to ignore s. 14A, it cannot be said that the explanation was not bona fide. Further, as Rule 8D was not enacted at the time, segregation of expenditure relatable to tax-free income would be disputable and lead to bona fide difference in opinion. So, penalty u/s 271(1)(c) cannot be levied (Asst year 2005-06).

[Source: DCIT vs Nalwa Investment Ltd. (Mumbai) (Trib) . www.itatonline.org]

Sec271(1)(c) - Penalty – Concealment-Surrender of income during survey (S133A) – No penalty leviable

Where A O has not brought on record any material to show that the additional income surrendered by the assessee during survey under section

133A was concealed income or that explanation was false, penalty under section 271 (1) (c) is not leviable. (Asst year 2006-07).

[Source: Dy CIT v Bhanwar Lal Mahendra Kumar Soni (2011) 138 TTJ 381 (JD) (Trib)]

Miscellaneous

Sec282 - Service of notice - Reassessment – Service of notice on chartered accountant(S148)

Service of notice under section 148 on a chartered accountant who was not empowered to receive such notice on behalf of the assessee company or any other person who was not authorised to receive was not a valid service of notice on the assessee, more so when it was not shown that the assessee was keeping out of way for the purpose of avoiding service of notice or that there was any other reason that the notice could not be served on the assessee in the ordinary way and therefore, assessment completed pursuant to said notice was bad in law. (Asst year 1999-2000).

[Source: Harsingar Gutkha (P) Ltd v Dy CIT (2011) 138 TTJ 318 (lucknow) (Trib)]

INDIRECT TAX

Service Tax

➤ Notification

Exemption date to Transportation of Goods by Rail Extended

Exemption to the taxable service provided to any person in relation to transport of goods by rail, is extended till January, 2012.

[Source: Notification No. 38-2011 ST, dated 14-06-2011]

➤ Case Laws

No Interest on Wrongly taken Cenvat Credit but not Utilized

Interest – Cenvat credit of Service tax – Management Consultant service provided – Service tax credit wrongly availed reversed when irregularity detected – Order-in-appeal holding interest not demandable as credit reversed before utilization, upheld by Tribunal – Concurrent finding of Commissioner (Appeals) and Tribunal that Cenvat credit wrongly availed was reversed- Demand of tax or interest not arises – Question of law absent and appeal dismissed – Rule 14 of Cenvat Credit Rules, 2004.

[Source: Commissioner of C. Ex., Ludhiana v Jagatjit Industries Ltd., 2011 (22) S.T.R. 518 (P & H)]

Registration not Required for Refund of Cenvat

Credit of Exported Service - Export of services – Refund of unutilized credit of Service tax taken in relation to export of services – Refund denied on the ground that refund claim pertaining to period prior to registration – Assessee required to pay Service tax alone to take registration – Respondent not liable to pay Service tax but merely claiming refund of unutilized credit of tax paid on input service – Impugned order holding that non-registration not a ground for rejecting refund, sustainable – Rule 5 of Cenvat Credit Rules, 2004.

[Source: Commissioner of Service Tax, Chennai v E-CARE India Pvt. Ltd., 2011 (22) S.T.R. 529 (Tri. – Chennai)]



Financing of Purchase of Coal Not Included as Service of C&F Agent

Clearing and Forwarding services- Activity of making payment of price of coal for various persons and arranging transportation by paying freight and arranging insurance, R/R etc.-Commission received from clients to whom finance provided- C.B.E.&C. Circular lists services undertaken by

C&F agent-Financing of purchase of coal not included as service of C&F agent- case also covered by decision in case of Hanuman Coal Co. when on similar facts Tribunal held the activity as not covered under C&F services-Decision of Co-ordinate Bench a correct view- Assessee allowed- Section 65(25) of Finance Act, 1994.

[Source: **Kaveri Coal Suppliers v Commissioner of C. Ex., Kanpur, 2011(23) STR 35 (Tri-Del.)**]

Vehicles used in residential colony and insurance on residential buildings is Input Service

Cenvat credit of Service tax – Input service – Vehicles used in residential colony of assessee and insurance on residential buildings – Bombay High Court in case of Coca Cola India Pvt. Ltd. [2009 (15) S.T.R. (Bom.)] observed that activities in relation to business can cover all activities related to functioning of a business and expression “business” is of wide import – Ratio of number of decisions that definition of Input Services quite wide – Activities used for business purpose, hence input services – Assessee is entitled to credit of Service tax paid on them –

Rule 2(1) of Cenvat Credit Rules, 2004.

[Source: **Ultratech Cement Ltd v Commissioner of C. Ex., Bhavnagar, 2011 (22) S.T.R. 578 (Tri. – Ahmd.)**]

Handling goods within factory not Cargo Handling Services

Cargo Handling Services- Handling goods within factory premises Shifting of unfinished goods in factory premises of another- Cargo handling service means loading, unloading, packing or unpacking of cargo- Cargo, according to dictionary meaning is loaded or unloaded on truck, aircraft and ship- Definition in Section 65(23) of Finance Act, 1994 not covers handling of goods within factory premises- Revenue’s appeal dismissed.

[Source: **Commissioner of C. Ex., Ranch v Modi Construction Company, 23011(23) STR 6 (Jhar.)**]

Central Excise

➤ **Notification**

DEPB scheme extended till 30-9-2011

Duty Entitlement Passbook Scheme, one of the most popular Export Promotion Scheme to reimburse local taxes to the exporters has been

extended till 30-9-2011, thus offering relief to mainly the exporters of Engg. Goods. The scheme was supposed to expire on 30th of June.

[Source: **DGFT Public Notice No. 55 (RE-2010)/2009-14, dated 17-06-2011**]

➤ **Case Laws**

Basis of Classification of Goods

Classification of goods- Scope of – Classification cannot be made on its scientific and technical meaning- it is only common parlance meaning of term which should be taken into consideration for determining tax liability.

[Source: **Commissioner of Trade Tax, UP v Kartos International, 2011 (268) ELT 289(SC)**]

No Penalty for Bonafide Error

Penalty- Cenvat/Modvat Credit, wrong availment- Wrong credit availed due to double entry- Credit reversed with interest as soon as pointed out- Impugned order observing same to be bona fide error- Error itself when bona fide, it needs to be condoned under discretionary powers provided for in law- Penalty set aside- Rule 15 of Cenvat Credit Rules, 2004.

[Source: Divgi Warner Pvt. Ltd. v Commissioner of C. Ex. Pune-I, 2011 (268) ELT 412 (Tri-Mumbai)]

Declaration is Mandatory for SSI Exemption

Clandestine manufacture and removal-SSI exemption- Excisable goods manufactured but registration not taken and no records maintained- finished goods cleared under Kachcha slips and the same destroyed as per statement of proprietor- Impugned order holding SSI exemption as eligible- Goods not automatically become exempts under SSI exemption Notification No. 8/2003-C.E. unless option therefore exercised- No declaration given on availment of SSI exemption- Confiscation and

penalty sustainable- Impugned order not correct in setting aside confiscation and penalty on firm- Separately penalty on proprietor not required- Section 5A of Central Excise Act, 1994-Rule 25 of Central Excise Rules, 2002.

[Source: Commissioner of C. Ex., Lucknow v Vinayak Drawings, 2011 (268) ELT 410 (Tri-Del.)]

Advertisement and Publicity Expenses are Part of Dutiable Value

Valuation (Central Excise)- Advertisement and publicity expenses- Expenses incurred by appellant on advertisement and publicity sought to be included- Expression 'to make provision for' appearing in Section 4 of Central Excise

Act, 1944 not exclusively related to amount required to be spent by buyer alone but also includes expenses by seller- Said expression appearing after the expression about obligation of buyer to pay price or other amount recoverable from buyer- Evidence not produced to prove that expenses incurred for complimentary items and the same not part of sale promotion scheme- Impugned order holding said charges as includible in value, upheld- Section 4 ibid.

[Source: DCM Engineering Products v Commissioner of C. Ex., Jalandhar, 2011 (268) ELT 396(Tri-Del.)]



COMPANY LAW UPDATES

➤ Circulars/Notification

Compliance of provisions of the Companies Act, 1956 and Rules made there under

The Ministry of Corporate Affairs has decided that in order to ensure Corporate Governance and proper compliances of provisions of Companies Act, 1956, no request, whether oral, in writing or through e-forms, for recording any event based information/changes shall be accepted by the Registrar of Companies from the defaulting companies unless they file their updated Balance Sheet and Profit & Loss Accounts and Annual Return with the Registrar of Companies.

However, in the interest of other stakeholders following event based information/changes will continue to be accepted by the Registrar of Companies from such defaulting companies:-

1. Form 32
2. Form 20B
3. Form 21A
4. Form DIN-3
5. Form 21

6. Form 23AC & ACA
7. Form 1 INV
8. Form 23B
9. Form 66

Moreover, it may be further noted that:

1. No e-filing shall be accepted by the Registrar of Companies from Directors of these defaulting companies for any other company also.
2. Members of ICAI, ICSI and ICWAI must not issue any certificates to such defaulting companies, till the defect is rectified.
3. This circular will not apply to such companies where the Balance Sheet and Annual Return could not be filed due to order of court/company law board or any other competent authority and concerned ROC has marked this company as having management dispute.

This shall be effective from 3rd July, 2011.

[Source: MCA General Circular no. 33/2011 dated 01.06.2011]

Filing of Balance Sheet and Profit and Loss

Account in XBRL mode from 2010-11

In suppression of Ministry's circular no. 9/2011 dated 31st March, 2011 and 25/2011 dated 12th May, 2011, Ministry of Corporate Affairs has mandated certain class of companies to file Balance Sheets Profit and Loss Account along with Director's and Auditor's Report for the year 2010-11 onwards by using eXtensible Business Reporting Language (XBRL) taxonomy. The following companies have to file the financial statements in XBRL Form only from the year 2010-11:

1. All companies listed in India and their Indian subsidiaries;
2. All companies having a paid-up capital of Rs. 5 crore and above;
3. All companies having a turnover of Rs. 100 crore and above

However banking companies, insurance companies, power companies and Non-Banking Financial Companies (NBFCs)

are exempted for XBRL filing, till further orders.

Further all companies falling in Phase-I whose Balance Sheets are adopted in the Annual General Meeting held before 30.09.2011 are permitted to file upto 30.09.2011 without any additional filing fee.

[Source: MCA General Circular no. 37/2011 dated 07.06.2011]

Clarification regarding participation by shareholders or Directors in meetings through electronic mode

The Ministry of Corporate Affairs has clarified about the participation by shareholders or directors in meetings under the provisions of Companies Act, 1956 through electronic mode as under:

- i. It is not mandatory for companies to provide its directors, the facility to attend meetings through video conferencing.
- ii. In respect of shareholders meetings to be held during financial year 2011-12, video conferencing facility for shareholders is optional. Thereafter, it is mandatory for all listed companies.
- iii. Where the company opts to provide video conferencing facility, they have to comply

with the procedures prescribed in the Circular no. 27/2011 & 28/2011 dated 20th May, 2011 in this regard.

- iv. The company is free to select Video Conferencing facility of any agency but the chairman of the meeting and Secretary of the company has to ensure that there is a proper Video Conferencing equipment/facility which enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate effectively in the meeting.
- v. In the case of e-voting in general meetings, the Ministry of Corporate Affairs are presently authorizing only National Security Depository Ltd. and Central Depository Services (India) Ltd. as agencies for providing and supervising electronic platforms for electronic voting subject to the conditions that they obtain a certificate from Standardization Testing and Quality Certification (STQC) Directorate, Department of Information Technology, Ministry of Communication and IT,

Government of India, new Delhi.

[Source: MCA General Circular no. 35/2011 dated 06.06.2011]

Special Drive to clear pendency of e-forms filed prior to implementation of revised Regulation 17 of the Companies Regulation, 1956

In order to reduce the pendency of e-forms, Ministry has decided to re-open all pending e-forms and the same have been placed in the category "Held in Abeyance" (HIAB) so that ROCs can review the same.

[Source: MCA General Circular no. 40/2011 dated 23.06.2011]

Issue of Certificates by Digital Signature

The Ministry has issued a General Circulars No. 29/2011 dated 20.05.2011 wherein it was informed that in order to cut timelines and an another step towards "Green Initiative" it has been decided that all certificates and standard letters issued by the Registrar of Companies will now be issued electronically under the Digital Signature of the Registrar of Companies.

In this regard, Ministry has already developed thirteen (13) such digitally signed

certificates and the same has been implemented under MCA-21 system as mentioned below:

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S. No.	Certificate Description	Form ID	Implementation date
1.	Certificate of Registration for Modification of Mortgage, etc. u/s 132 read with section 135 of the Companies Act, 1956. (STP)	Form 8	29-May-11
2.	Memorandum of Satisfaction of Mortgage, etc., Section 140 of the Companies Act, 1956 (STP)	Form 17	29-May-11
3.	Certificate of Registration of Mortgage, etc. Under Section 132 of the Companies Act, 1956 (STP)	Form 8	29-May-11
4.	Certificate of Incorporation	Form 1	12-Jun-11
5.	Certificate for Establishment of Place of Business In India	Form 44	12-Jun-11
6.	Certificate of Registration for Modification of Mortgage, etc. u/s 132 read with section 135 of the Companies Act, 1956. (NON STP)	Form 8	12-Jun-11
7.	Certificate of Satisfaction of Mortgage, etc. Section 140 of the Companies Act, 1956 (Non STP)	Form 17	12-Jun-11
7.	Certificate of Registration of Mortgage, etc. Under Section 132 of the Companies Act, 1956 (NON STP)	Form 17	12-Jun-11
9.	Fresh Certificate of Incorporation Consequent upon Change of Name	Form-IB	12-Jun-11
10.	Fresh Certificate of Incorporation Consequent upon Change of Name on Conversion to Public Limited Company	Form 62	12-Jun-11
11.	Certificate of Registration of Company Law Board order for Change of State	Form 18	12-Jun-11
12.	Certificate of Registration of the Special Resolution Confirming Alteration of Object Clause (s)	Form 23	12-Jun-11
13.	Fresh Certificate of Incorporation Consequent upon Change of Name on Conversion to Private Limited Company	Form-IB	12-Jun-11

It may please be noted that the remaining certificates are planned to be implemented by 3rd July, 2011.

The Registrar of Companies is hereby advised that after the date of implementation of Digital Certificates, no certificates shall be issued manually. All such pending certificates which are required to be issued manually should be issued by 30th June, 2011.

[Source: MCA General Circular no. 39/2011 dated 21.06.2011]

Companies (Amendment) Regulations, 2011 regarding six Regional Directors

The Ministry of Corporate Affairs has amended the Companies Regulations, 1956 by substitution of Clause (d) of Regulation 2 regarding **six Regional Directors** and the said regulations may be called as The Companies (Amendment) Regulations, 2011.

[Source: MCA Notification no. G.S.R. 453 dated 14.06.2011]

Guidelines for Fast Track Exit mode for defunct companies under section 560 of the Companies Act, 1956

In order to give an opportunity for fast track exit by a defunct

company, for getting its name struck off from the register of companies, the Ministry of Corporate Affairs has decided to modify the existing route through e-form-61 and has prescribed the new Guidelines. These Guidelines will be effective from 3rd July, 2011.

[Source: MCA General Circular no. 36/2011 dated 07.06.2011]

The Companies (Cost Audit Report) Rules, 2011

The Ministry of Corporate Affairs has decided to amend the Cost Audit Report Rules, 2001. The said amended rules may be called as Companies (Cost Audit Report) Rules, 2011.

[Source: MCA Notification no. G.S.R. 430(E) dated 03.06.2011]

The Companies (Cost Accounting Records) Rules, 2011

The Ministry of Corporate Affairs has decided to amend the Cost Accounting Record Rules. The said amended rules may be called as Companies (Cost Accounting Records) Rules, 2011.

[Source: MCA Notification no. G.S.R. 429(E) dated 03.06.2011]

Companies Director Identification Number (Second Amendment) Rules, 2011

The Ministry of Corporate Affairs has decided to amend the Companies (Director Identification Number) Rules, 2006. The said amended rules may be called as Companies Director Identification Number (Second Amendment) Rules, 2011 and it is effective from 12th June, 2011.

[Source: MCA Notification no. G.S.R. 427(E) dated 02.06.2011]



SEBI & RBI UPDATES

➤ Circular

Shareholding of promoter / promoter group to be in dematerialized mode

In order to further promote dematerialization of securities, encourage orderly development of the securities market and to improve transparency in the dealings of shares by promoters including pledge / usage as collateral, SEBI in consultation with Stock Exchanges, has decided that the securities of companies shall be traded in the normal segment of the exchange if and only if, the company has achieved 100% of promoter's and promoter group's shareholding in dematerialized form latest by the quarter ended September 2011 as reported to the stock exchanges.

[Source: Cir/ISD/ 3/2011 dated 17.06.2011]

Change of Name by Listed Companies

SEBI circular dated April 30, 2004 required all listed companies seeking change of

name to comply inter alia with the following provision:

2.2 At least 50% of its total revenue in the preceding 1 year period should have been accounted for by the new activity suggested by the new name.

Now, SEBI has decided to modify the Para 2.2 of the aforementioned circular as under:

2.2. At least 50% of its total revenue in the preceding 1 year period should have been accounted for by the new activity suggested by the new name

Or

The amount invested in the new activity/project (Fixed Assets + Advances + Works in Progress) is atleast 50% of the assets of the company. The 'Advances' shall include only those extended to contractors and suppliers towards execution of project, specific to new activity as reflected in the new name. **To confirm the compliance of the aforesaid provision 2.2,**

the company shall submit auditor's certificate to the exchange.

[Source: CIR/MRD/DP/ 07 /2011 dated 16.06.2011]

Modification to Investor Protection Fund (IPF)/ Customer Protection Fund (CPF) Guidelines

SEBI has decided to modify the Comprehensive Guidelines by substituting Clause 8, Clause 13, Clause 23 and Clause 24. Moreover, Clause 22 has been deleted.

[Source: CIR/MRD/DP/ 06 /2011 dated 16.06.2011]

Standardization of Rating Symbols and Definitions

There is a need for common rating symbols and definitions for easy understanding of the rating symbols and their meanings by the investors, and to achieve high standards of integrity and fairness in ratings. In consultation with the CRAs and considering the international practices, standardized symbols and their definitions have been devised for the following:

- a) Long term debt instruments;
- b) Short term debt instruments;
- c) Long term structured finance instruments;
- d) Short term structured finance instruments;
- e) Long term mutual fund schemes; and
- f) Short term mutual fund schemes.

[Source: CIR/MIRSD/4/2011 dated 15.06.2011]

Overseas Direct Investment-Liberalisation/Rationalisation

In modification to Notification No. FEMA 120/RB-2004 dated July 7, 2004 Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004 and related circulars issued thereunder, with a view to restating the various provisions relating to transfer by way of sales of a joint venture or wholly owned subsidiary (JV or WOS) outside India with and without write off, the existing guidelines are consolidated as indicated below:

Transfer by way of sale of shares of a JV / WOS

An Indian Party, without prior approval of the Reserve Bank, may transfer by way of sale to another Indian Party which complies with the provisions of Regulation 6 of FEMA Notification 120/RB-2004 dated July 7, 2004 or to a person resident outside India, any share or security held by it in a JV or WOS outside India subject to the following conditions:

- i. the sale does not result in any write off of the investment made.
- ii. the sale is to be effected through a stock exchange where the shares of the overseas JV/ WOS are listed;
- iii. if the shares are not listed on the stock exchange and the shares are disinvested by a private arrangement, the share price is not less than the value certified by a Chartered Accountant / Certified Public Accountant as the fair value of the shares based on the latest audited financial statements of the JV / WOS;
- iv. the Indian Party does not have any outstanding dues by way of dividend, technical know-how fees, royalty, consultancy,

commission or other entitlements and / or export proceeds from the JV or WOS;

- v. the overseas concern has been in operation for at least one full year and the Annual Performance Report together with the audited accounts for that year has been submitted to the Reserve Bank;
- vi. the Indian party is not under investigation by CBI / DoE/ SEBI / IRDA or any other regulatory authority in India.

Transfer by way of sale of shares of a JV / WOS involving write off of the investment

(a) Indian Parties may disinvest without prior approval of the Reserve Bank, in the under noted cases where the amount repatriated on disinvestment is less than the amount of the original investment:

- i. in cases where the JV / WOS is listed in the overseas stock exchange;
- ii. in cases where the Indian Party is listed on a stock exchange in India and has a net worth of not less than Rs.100 crore;
- iii. where the Indian Party is an unlisted company and

- the investment in the overseas venture does not exceed USD 10 million and
- iv. where the Indian Party is a listed company with net worth of less than Rs.100 crore but investment in an overseas JV/WOS does not exceed USD 10 million.
- (b) Such disinvestments shall be subject to the conditions listed at items (ii) to (vi) of paragraph 2 above.

An Indian Party, which does not satisfy the conditions stated above for undertaking any disinvestment in its JV/WOS abroad, shall have to apply to the Reserve Bank for prior permission.

[Source: RBI/2010-11/584A.P. (DIR Series) Circular No. 73 June 29, 2011]

Buyback / Prepayment Of Foreign Currency Convertible Bonds (FCCBs)

After reviewing the current policy on buyback/prepayment of Foreign Currency Convertible Bonds (FCCBs), the Reserve Bank in consultation with the Government of India, has decided to extend the time limit for buyback of FCCBs

issued by Indian companies up to March 31, 2012 at reduced discount rates.

Accordingly, Indian companies have been permitted to buyback the FCCBs at a minimum discount of 8 per cent on the book value utilizing their foreign currency funds under the automatic route. Indian companies may also buyback the FCCBs at a minimum discount between 10 and 20 per cent on the book value utilizing their internal accruals under the approval route. Detailed instructions have been issued vide A.P. (DIR Series) Circular No. 75 dated June 30, 2011.

[Source: Press Release: 2010-2011/1909 dated 30.06.2011]

Relaxation: Issue of equity shares under the FDI Scheme allowed under the Government route

Attention of Authorised Dealers Category – I (AD Category - I) banks is invited to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000, notified vide Notification No. FEMA 20/2000-RB dated May 3, 2000, as amended from time to time.

2. In terms of the Schedule 1 of the Notification, *ibid*, an Indian company may, under the automatic route, issue equity shares/ preference shares to a person resident outside India, being a provider of technology / technical know-how and against royalty / lumpsum fees due for payment subject to certain conditions like entry route, sectoral cap, pricing guidelines and compliance with the applicable tax laws.

3. The extant guidelines for issue of equity shares/ preference shares under the Government route have been reviewed in consultation with the Government of India and, accordingly, it has been decided to permit issue of equity shares / preference shares under the Government route of the FDI scheme for the following categories of transactions:

(I) Import of capital goods/ machineries / equipments (including second-hand machineries), subject to compliance with the following conditions:

- a. The import of capital goods, machineries, etc., made by a resident in India, is in accordance with the Export / Import Policy issued by the

- Government of India as notified by the Directorate General of Foreign Trade (DGFT) and the regulations issued under the Foreign Exchange Management Act (FEMA), 1999 relating to imports issued by the Reserve Bank;
- b. There is an independent valuation of the capital goods / machineries / equipments (including second-hand machineries) by a third party entity, preferably by an independent valuer from the country of import along with production of copies of documents /certificates issued by the customs authorities towards assessment of the fair-value of such imports;
- c. The application should clearly indicate the beneficial ownership and identity of the importer company as well as the overseas entity; and
- d. All such conversions of import payables for capital goods into FDI should be completed within 180 days from the date of shipment of goods.
- (II) Pre-operative/pre-incorporation expenses (including payments of rent,

etc.) subject to compliance with the following conditions:

- a) Submission of FIRC for remittance of funds by the overseas promoters for the expenditure incurred;
- b) Verification and certification of the pre-incorporation/ pre-operative expenses by the statutory auditor;
- c) Payments should be made directly by the foreign investor to the company. Payments made through third parties citing the absence of a bank account or similar such reasons will not be eligible for issuance of shares towards FDI; and
- d) The capitalization should be completed within the stipulated period of 180 days permitted for retention of advance against equity under the extant FDI policy.
- 4.(i) All requests for conversion should be accompanied by a special resolution of the company.

(ii) Government's approval would be subject to pricing guidelines of the Reserve Bank and appropriate tax clearance.

[Source: RBI/2010-11/586A. P. (DIR Series) Circular No.74 June 30, 2011]

Remittance of assets by foreign nationals- Opening of NRO Accounts

AD Category-I banks may permit foreign nationals to re-designate their resident account maintained in India as NRO account on leaving the country after their employment to enable them to receive their pending bonafide dues, subject to the following conditions:

- (a) AD Category-I bank should obtain the full details from the account holder about his legitimate dues expected to be received into his account.
- (b) AD Category-I bank has to satisfy itself as regards the credit of amounts which have to be bonafide dues of the account holder when she / he was a resident in India.
- (c) The funds credited to the NRO account should be repatriated abroad immediately, subject to the AD Category-I bank satisfying itself regarding the payment of the applicable Income tax and other taxes in India.
- (d) The amount repatriated abroad should not exceed USD one million per financial year.

- (e) The debit to the account should be only for the purpose of repatriation to the account holder's account maintained abroad.
- (f) There should not be any other inflow / credit to this account other than that mentioned at point (a) above.
- (g) The account should be closed immediately after all the dues have been received and repatriated as per the declaration made by the account holder mentioned at paragraph 2 (a) above.
- [Source: RBI/2010-11/ 560 A.P. (DIR Series) Circular No.70 dated 09.06.2011]



CORPORATE FINANCE

➤ Latest News

PRIVATE EQUITY

GSV Takes Stake In Facebook, Valuing It At \$70Bn

Investment fund GSV Capital Corp has taken a small stake in Facebook that values the world's No. 1 social networking site at about \$70 billion. The investment fund said on Monday that it had bought 225,000 shares in Facebook at an average price of \$29.28 each.

[Sources:-www.vccircle.com June 28, 2011]

Parekh Aluminex To Offload 35% Stake Via Preferential Issue

Aluminum foil containers maker Parekh Aluminex Ltd is looking to raise as much as Rs 100 crore (\$22 million) through a preferential allotment to a host of overseas funds including Kitara Capital. The proceeds of the preferential share issue would be used for expansion and working

capital requirement of the company

[Sources:-www.marketsbull.com June 30, 2011]

Apollo To Invest Up To Rs 2,250Cr In Welspun Group

Private equity major Apollo Global Management is investing up to \$494 million (Rs 2,250 crore) in three companies of BK Goenka-promoted Welspun Group – a \$3 billion group which has diversified interests in various segments, from pipelines to textiles to infrastructure. The deal involves Apollo picking up a significant minority stake in the group's flagship Welspun Corp Ltd (for Rs 1,305 crore) and WelspunMaxsteel Ltd (for Rs 270 crore).

[Sources:-www.thehindubusinessline.com June 29, 2011]

Taj Capital Partners Backs Out Of PIPE Deal In Capital Trust

Boutique investment firm Taj Capital Partners, which was

in the process of investing around Rs 16.4 crore (\$3.8 million) in Delhi-based financial services firm Capital Trust Ltd, has called off the deal due to regulatory changes hitting the microfinance sector.

[Sources:-www.vccircle.com June 29, 2011]

MERGERS & ACQUISITIONS

Yash Birla Group Acquire 51% Stake in Mansycom Consultants

Mumbai-based Yash Birla Group has acquired 51 per cent controlling stake in the Noida-based knowledge process outsourcing firm Mansycom Consultants Pvt Ltd for an undisclosed amount.

The Yash Birla Group is a diversified conglomerate that operates in auto and engineering, textile, chemicals, wellness, lifestyle, education, IT, power, electrical, infrastructure,

trading and financial services sectors.

[Source:- www.business-standard.com June 30, 2011]

Passport Capital Sells 1.6% In Financial Technologies

Hedge fund Passport Capital has sold 1.6 per cent stake for Rs 62 crore in Financial Technologies (India) Ltd, which is behind the Multi Commodity Exchange of India (MCX). Passport, which also holds a stake in MCX, has been cutting its stake over the last 18 months from its peak of 10 per cent in March, 2009. With the latest selloff, its stake will now fall to around 1.2 per cent.

[Sources:- www.vccircle.com June 29, 2011]

Khattar Holdings Acquires 14% stake in Nano Tech Co- NAND Ipl

Singapore-based investment firm Khattar Holdings Pvt Ltd has picked up 14 per cent stake in Gurgaon-based Navran Advanced Nanoproducts Development International Pvt Ltd (NAND Ipl) for an undisclosed amount. Credence Advisors, a Delhi-based advisory firm, was the sole advisor in this transaction.

[Sources:- www.timesofindia-news.blogspot.com June 17, 2011]



VENTURE CAPITAL

Clearstone's Rajan Mehra Joins \$75M Venture Fund Nirvana

Nirvana Venture Advisors, which is raising a \$75 million venture fund anchored by the Patni family, has roped in former eBay India country manager Rajan Mehra as its managing director.

Earlier this year, the Patni family had sold their 45.6 per cent stake in India's sixth largest IT firm Patni Computer Systems to iGate Corporation and Apax Partners.

[Source:- www.fusetv.com June 15, 2011]

Citigroup To Close CVCI Japan Office

Citigroup will close its Japan office for Citi Venture Capital International as the high-growth focused fund management firm has failed to find any attractive investments. Citi Venture Capital International had opened its Japan office in September 2006.

[Source:- www.informbusinessnetwork.com, June 13, 2011]

Sequoia Capital Invests \$25M In Data Analytics Firm Mu Sigma

Chicago-based data analytics firm Mu Sigma has raised \$25 million in Series C financing of \$25 million from Sequoia Capital. The deal was led by Sequoia Capital India managing director Shailendra Singh, who now also joins the board of the company.

[Source:- www.venturebeat.com June 7, 2011]

Nexus Venture Partners Leads \$15M Round In Aryaka Networks Inc.

California based WAN optimisation and cloud computing startup Aryaka Networks Inc. has raised \$15 million in a Series B round of

funding. The round was led by Nexus Venture Partners, while Trinity Ventures and Mohr Davidow Ventures participated in it. The funds will be used to fuel the company's foray into new markets - Asia and Europe [Source:www.tech.circlevccircle.com, June 08, 2011]

INVESTMENT BANKING

ABN AMRO Seeks India Bank Licence

Dutch state-owned bank ABN AMRO has applied to the Reserve Bank of India for a licence to open a branch in the country, according to a media report. ABN AMRO,

which is being readied for a stock market listing in 2014, plans to re-enter India to revive its core diamond financing business and also to tap fast-growing loan demand, a former executive with the bank in India confirms.

[Sources:-www.vccircle.com
June 03, 2011]



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